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IN THE DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA, TAMPA DIVISION.

WILMA ADDISON, ERNESTINE C. LYLES, EDGAR CAMPBELL, SALLIE BAKER, and LUTHER BLACK, ET AL.,

Plaintiffs,

versus No. 441.

HOLLY HILL FRUIT PRODUCTS, INCORPORATED, a Florida. Corporation,

Defendant.

AGREED STATEMENT OF FACTS ON APPEAL.

Pursuant to the terms of Rule 76 of the rules of Civil Procedure, the parties hereto, believing that the questions presented by the appeal herein of the defendant from the final judgment entered in the District Court on April 9, 1943 can be determined by the Circuit Court of Appeals of the Fifth Circuit without an examination of all the pleadings, evidence and proceedings in the Court below, present this statement of the case showing how the questions arose and were decided in the District Court and setting forth so many of the pleadings, stipulations, and evidence as are essential to a decision by said Circuit Court of Appeals as follows:

1. Five named employees as individuals, and as agents and representatives of other employees, filed their complaint against the defendant for underpay and overtime compensation, liquidated damages, attorneys fees, and costs under the Fair Labor Standards Act of 1938 covering

two citrus canning seasons—the season of 1938-39 and the season of 1939-40.

The said amended complaint being as follows:

1. Wilma E. Addison, Ernestine C. Lyles, Edgar Campbell, Sallie Baker and Luther Black, plaintiffs, in their capacities as individuals and as agents and representatives for the employees listed in Exhibit No. 1 attached hereto and made a part hereof, and Holly Hill Fruit Products, Inc., a Florida Corporation, having its principal office and place of business in Davenport, Polk County, Florida, defendant in an action to recover liabilities imposed upon said defendant in favor of plaintiffs and those whom they represent, by Section 16-b of the Fair Labor Standards Act of 1938, for *under-pay* and *over-time* compensation, liquidated damages, attorneys' fees, and costs incurred by defendant by virtue of said Act in and during the period dating from the 24th day of October, 1938, for, and including, the two citrus seasons of 1938-1939 and 1939-1940.

2. Jurisdiction of this cause is conferred on this Court by the provisions of section 16-b of said Fair Labor Standards Act of 1938 (29 U. S. C. A. 216-b) and Section 41 (8) 28 U. S. C. A. by which latter section jurisdiction is conferred upon this Court as to "all suits and proceedings arising under any laws regulating commerce", said Fair Labor Standards Act of 1938 being a law regulating commerce; and also by the provisions of Section 41 (9) 28 U. S. C. A., by which section jurisdiction is conferred on this court "of all suits and proceedings for the enforcement of penalties *** incurred under any law of the United States" to the extent that the liability imposed by said Fair Labor Standards Act of 1938 is in the nature of a penalty.

3. The defendant is a Florida Corporation, having its principal office and place of business at Davenport, Polk County, Florida, and also has an agent in said County and an office therein, upon whom process by this Court may be served.

4. Plaintiffs have been duly designated as agents and representatives of and for those of the defendant's employees listed in Exhibit No. 1 attached hereto and prayed to be taken as a part hereof, and under the authority of said Fair Labor Standards Act of 1938, have full power and authority to maintain this action in their behalf to recover the liabilities imposed by said Act for its violation.

5. Defendant was, during the citrus seasons aforesaid, namely, 1938-1939 and 1939-1940, and ever since said time has been, and still is, engaged in the canning and/or processing and/or manufacturing into commercial by-products of citrus fruits for shipment in commerce, a substantial part of which was, during said period covered by this suit, shipped by said defendant to points outside the State of Florida, and, during said period, it derived a substantial part of its produce from points beyond and outside of the "area of production" as defined by the Administrator of the said Fair Labor Standards Act of 1938, as follows:

(a) for the period from October 20, 1938 to April 19, 1939 as defined in his regulation of October 20, 1938.

(b) for the period from April 20, 1939 to June 17, 1939 as defined in his modified regulation of April 19, 1939.

(c) for the period from June 17, 1939 to the end of the 1940 citrus fruit season as defined by his regulation of June 15, 1939."

6. Plaintiffs show unto this Court that, in each of the work weeks during the said two citrus seasons of 1938-1939 and 1939-1940, defendant employed a large number of persons, including plaintiffs and all the persons listed in Exhibit No. 1 hereto, who have designated the plaintiffs as agents and representatives, for a part of the time, in the essential processes and operations necessary to the canning and/or converting into commercial by-products of citrus fruits for commerce, and a substantial part of such products so worked on by said persons, including plaintiffs and those whom they represent as agents as aforesaid, was shipped by the defendant to points outside of the State of Florida and sold to dealers for shipment to points outside said State.

7. During and throughout said period, the plaintiffs and the persons described in Exhibit No. 1 hereto, who have designated the plaintiffs as their representatives and agents, have been paid by the defendant wages at rates less than the statutory minimum rates fixed for their employment for the processing of citrus fruits in interstate commerce as aforesaid, namely, less than 25¢ an hour for the citrus season of 1938-1939 and less than 30¢ an hour for the citrus season of 1939-1940. By failing and refusing to pay to its said employees wages at a rate less than said rate during said period, said defendant violated the provisions of Section 6 of the Fair Labor Standards Act.

8. During all of said periods, the said defendant employed plaintiffs and the persons described in Exhibit No. 1 hereto who have designated the plaintiffs as their representatives and agents and who were then and there engaged in the processing of citrus fruits for interstate commerce as aforesaid, for work weeks of longer than 44 hours in the citrus season of 1938-1939 and longer than

42 hours in the 1939-1940, and have failed to compensate said employees for said employment in excess of said minimum hours per week at rates not less than one and one-half times the minimum statutory rates at which they were employed, and, in fact, have failed and refused to compensate them for such excess hours at any rate greater than the regular rates at which they were employed. By employing said employees for work weeks in excess of said hours during said periods without compensating them for their employments in excess of the said hours in such work weeks at rates not less than one and one-half times the regular rates at which they were employed, or the minimum statutory rates at which they were employed, the defendant has violated and is violating the provisions of Section 7 of the Fair Labor Standards Act.

9. During said periods, namely, the citrus seasons of 1938-1939 and 1939-1940, the defendant has sold, shipped, delivered, transported and offered for transportation in interstate commerce from said canning plant at Davenport, Florida, to, into and through states other than the State of Florida, goods processed in said canning plant in the processing of which all the plaintiffs were employed in violation of Sections 6 and 7 of the act, as alleged in paragraphs 7 and 8 hereof.

10. During said period, namely, the citrus fruit seasons of 1938-1939 and 1939-1940, the defendant has shipped, delivered and sold, with knowledge that shipment, delivery and sale thereof in interstate commence from points within the State of Florida to, into, and through, other states was intended, citrus fruits processed in said canning plant at Davenport, Florida, in the processing of which all of the

plaintiffs were employed in violation of Sections 6 and 7 of the Act as alleged in paragraphs 7 and 8 hereof.

(Paragraphs 11, 12, 13 and 14 eliminated).

15. The names, addresses, hours worked by each, rates at which each of them were employed, wages earned by them for said over-time, as well as for regular time; amounts and purposes for which weekly deductions were made from earnings and net amounts paid weekly to all of the employees of said defendant represented by the plaintiffs herein are matters peculiarly within the knowledge of the defendant and are not matters of which the plaintiffs have complete and accurate records, and the plaintiffs, as a part of the relief sought in this case, seek and pray access to said records and full and complete information in reference to said matters shown on the records which the said defendant company is required by said Act to be kept.

16. Plaintiffs therefore demand judgment against the defendant for and on behalf of all the plaintiffs and all other persons listed on Exhibit No. 1 attached hereto and prayed to be taken as a part hereof, all of whom have designated the plaintiffs as their representatives and agents in the collections of said sums, said judgment to be against said defendant company for *underpay, overtime*, liquidated damages, attorneys' fees and court costs, as to each person severally in accordance with the fair standards of labor established by said act, and the employment of each of said persons by the defendant.

On February 9, 1942, the plaintiffs filed Powers of Attorney for each of the hour employees named in the final judgment entered on April 9, 1943 appointing Wilma Addison, Ernestine Lyles, Edgar Campbell, Sallie Baker,

and Luther Black as their attorneys in fact authorizing the prosecution of this cause on behalf of said plaintiff-employees.

On April 11, 1943, defendant filed its Answer as follows:

(The Court struck the First Defense and no point is raised in this Court).

Second Defense.

1. This defendant admits the allegations of Paragraph I of said amended complaint except that the defendant denies that the plaintiffs named therein are duly authorized as agents and representatives to bring this action in behalf of the persons listed in Exhibit 1 attached to said complaint and made a part thereof.

2. This defendant denies this Court has jurisdiction of this cause under the statutes set forth in Paragraph II of said amended complaint.

3. The defendant admits that it is a Florida Corporation, having its principal place of business at Davenport, Florida, Polk County, and that it has an agent in said county and an office therein, upon whom process by this Court may be served.

4. The defendant denies that plaintiffs have been duly designated as agents and representatives of and for those of the defendant's employees listed in Exhibit No. 1 attached to the complaint, and the defendant denies that the plaintiffs have full power and authority, or any authority whatever, to maintain said action in their behalf to recover the liabilities imposed by the Fair Labor Standards Act for violation of said act.

5. This defendant admits that it was during the citrus seasons 1938-1939, 1939-1940 engaged in the canning of citrus fruits for shipment in commerce and that a substantial part thereof was, during said two seasons, shipped by said defendant to points outside of the State of Florida, but this defendant denies it was engaged in processing or manufacturing into commercial by-products of citrus fruits during said times alleged.

"The defendant separately preserves its defense based upon the provisions of Section 13 (a) (10) of the Act, hereinafter set forth as the Fourth Defense to the complaint.

6. This defendant admits that during its work weeks of the two seasons named, it employed a large number of persons but denies that the plaintiffs and all of the persons listed in Exhibit 1 were employed for each of said workweeks or for part of the time, and denies that the plaintiffs, or persons listed in Exhibit 1, were employed in the essential processes and operations necessary to the canning and/or converting into commercial by-products of citrus fruits for commerce and denies that a substantial part of its products worked on by the plaintiffs, or the persons listed on Exhibit 1, or any of them, were shipped to points outside the State of Florida during each of the workweeks or sold to dealers for shipments outside the State during each of said workweeks.

7. The defendant denies that during and throughout the said citrus seasons, the plaintiffs and the persons described in Exhibit No. 1 of the complaint, have been paid by the defendant wages at rates less than the statutory minimum rates fixed for their employment for the processing of citrus fruits in interstate commerce, namely, less than 25¢ an hour for the citrus season of 1938-1939

and less than 30¢ an hour for the citrus season of 1939-1940. The defendant denies that it failed and refused to pay its said employees wages at a rate less than that fixed by Section 6 of the Fair Labor Standards Act.

8. The defendant denies that during the said citrus seasons it employed the plaintiffs and the persons described in Exhibit No. 1 to the complaint, in the processing of citrus fruits for interstate commerce for workweeks of longer than 44 hours in the citrus season of 1938-1939 and longer than 42 hours in the season of 1939-1940, and the defendant denies that with respect to the number of hours the defendant employed the plaintiffs and the persons described in Exhibit No. 1 of the complaint, and in the payment of wages for such hours of work in each workweek, it violated the provisions of section 7 of the Fair Labor Standards Act.

9. The defendant denies that during said periods, namely, the citrus seasons of 1938-1939 and 1939-1940, the defendant has sold, shipped, delivered, transported, and offered for transportation in interstate commerce from its canning plant at Davenport, Florida, to into and through States, other than the State of Florida; goods processed in said canning plant in the processing of which the plaintiffs or any of them were employed is violation of Sections 6 and 7 of the Fair Labor Standards Act.

10. The defendant denies that during said periods, namely, the citrus fruit season of 1938-1939 and 1939-1940, the defendant has shipped, delivered, and sold with knowledge that shipment, delivery and sale thereof in interstate commerce from points within the State of Florida to, into and through, other states was intended, citrus fruits processed in said canning plant at Davenport, Florida, in the processing of which the plaintiffs or any

of them were employed, in violation of Section 6 and 7 of the Fair Labor Standards Act.

15. The defendant denies that the names, addresses, hours worked by each, rates at which each of them were employed, wages earned by them for said over-time, as well as for regular time, amounts and purposes for which weekly deductions were made from earnings and net amounts weekly to all of the employees of said defendant represented by the plaintiffs are matters of which the plaintiffs have complete and accurate records, and the defendant denies that the plaintiffs, as a part of the relief sought in this case, have any right to access to the records of the defendant.

16. The defendant denies that the plaintiffs have any right to demand or obtain judgment against the defendant for and on behalf of the plaintiffs and the persons listed in Exhibit No. 1 of the complaint, for under-pay, overtime, liquidated damages, attorneys' fees, and Court costs, or for any sums of money whatsoever, under the terms and provisions of said Fair Labor Standards Act or any other statute.

Third Defense.

The Fair Labor Standards Act, under which this suit is brought, among other things provides for maximum hours of work to be performed subject to the Act without the payment of overtime, the same being set forth in Section 7 of said Act. In said Section 7, it is likewise provided:

"(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

"(3) For a period or periods of not more than fourteen workweeks in the aggregate calendar year in an industry found by the Administrator to be of a seasonal nature, and if such employee receives compensation for employment in excess of 12 hours in any work day or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed."

That the administrator of the Wage and Hour Division did make a finding that "the first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature within the meaning of Section 7 (b) (3) of the Fair Labor Standards Act and Part 526, as amended, of the regulations issued thereunder." Said interpretation or ruling was published in the Federal Register of August 24, 1940.

This defendant avers that, during the two seasons alleged in the complaint, it was engaged in the canning or first processing of perishable or seasonal fresh fruits and that the operations of this defendant were at all times during said seasons in accordance with the requirements of the Administrator of the Wage and Hour Division as to a seasonal industry; that the canning of citrus fruit by this defendant, during the seasons referred to in the complaint, was the canning of perishable and seasonal fresh fruits, that it was a branch of an industry and of a seasonal nature within the meaning of Section 7 (b) (3), and that the defendant is entitled to apply the seasonal exemption provided for by said Section as to each of the employees individually since said Act went into effect on October 24, 1938.

This defendant further avers that there have been no changes in the seasonality of the industry, in the mode

of operations, or any other changes that would make the situation different during the seasons referred to in the complaint than they were on August 24, 1940, at the time of the determination by the Administrator.

Fourth Defense.

This defendant avers that the Fair Labor Standards Act likewise provides for an exemption from the maximum hours provision of said Act during a period or periods of not more than 14 weeks in the aggregate of any calendar year to an employer engaged "in the first processing of, or in canning or packing perishable or seasonal fresh fruits and vegetables", all of which will appear from Section 7-c of said Act, and this Defendant avers that it was engaged in the first processing of, or in canning perishable and seasonal fresh fruits and vegetables during each work week of the seasons referred to in the complaint, and that it is entitled to apply said fourteen unlimited weeks to the services of the respective employees since the Act went into force and effect, to-wit: October 24, 1938.

The defendant was engaged in such business and operated its canning plant approximately seven work weeks during the calendar year 1938, after the effective date of the Fair Labor Standards Act. During the calendar year 1939 defendant operated its said plant approximately twenty-one work weeks from January 1, 1939 to May, 26, 1939, and approximately six work weeks from November 16, 1939 to December 31, 1939; and during the year 1940, for the period of time covered by the complaint, approximately thirteen work weeks, a total of forty-seven work weeks up to March 30, 1940.

The defendant claims exemption from the maximum hours provisions of the Act (Section 7-c) on behalf of it-

self and its employees, collectively and/or individually, during the seven work weeks that it operated its plant during the seasons of 1938, for the first fourteen weeks of the calendar year 1939, and for the entire nine work weeks of the operation of said plant during the year 1940 covered by the complaint.

Fifth Defense.

1. Each of the plaintiffs, when employed at the times set forth in the complaint, was employed within the area of production, engaged in handling, preparing in their raw or natural state or canning of agricultural or horicultural commodities for market, to-wit: citrus fruits, at the plant of the defendant at Davenport, Polk County, Florida.

2. Davenport is a town of less than 2,500, in fact being a town of 650 population, according to the 15th U. S. Cerisus, 1930, and is a typical rural community, containing within its corporate limits many citrus groves from some of which the defendant draws some of its supplies of citrus fruit, said plant being practically adjacent to some of said groves.

3. During the period mentioned in the complaint, approximately 48 million boxes of citrus fruit were produced annually in Florida's 39 citrus producing counties, for shipment in commerce or approximately 50% of all the citrus produced in the United States, of which total 36.3% was produced in Polk county where defendant's plant is located, being approximately three times as much as is produced in any other county in Florida, the next largest production being in Orange County, approximately 25 miles to the north of defendant's plant, which is located at or near the exact geographical center of the production of citrus in the largest citrus producing state in the United States, nearly all of said citrus producing counties

being contiguous, and forming a well recognized area of citrus production as it has uniformly and customarily been recognized for many years, and as it has been defined by statute and by regulation in the administration of many state and federal laws prior to the adoption of the Fair Labor Standards Act of 1938; all of which have been heretofore undertaken to be administered uniformly throughout said area, where the production, handling and canning of citrus fruits have simultaneously developed under uniform conditions of competition and regulation as to labor conditions as well as otherwise, and where no logical lines of classification can be drawn bearing a reasonable relationship to the objections of the Act. The result of this integrated development of citrus is that the usual range of farm travel is great, many producers owning grove properties more than 100 miles distant, but belonging to a cooperative or customarily dealing with a single independent handler in proximity to one of such grove properties, and producers and handlers alike are competitors and neighbors, meeting in common markets and under common conditions to bid against one another for a single labor supply or a single price or to exchange solutions of their common problems though their groves or their establishments may be more than 100 miles apart.

4. The defendant was, during the times covered by the complaint, engaged in the canning of agricultural commodities for market, to-wit: citrus fruits. The canning season in Florida usually runs from approximately November 1st to June 1st and during the seasons referred to in the complaint, this defendant was engaged in canning citrus fruits during the following periods:

November 14, 1938 to May 26, 1939.

November 16, 1939 to March 30, 1940.

5. The defendant is a cooperative organized and existing under the laws of the State of Florida and the ownership

of the stock of the defendant corporation is restricted to the owners of bearing groves located within Township 26 and 27 South, Range 18 East who patronize the Company. The defendant operates its canning plant at Davenport, Florida primarily for the benefit of the members of the Association and the defendant has under its care and control something over 2,000 acres of grove.

6. Section 13 (a) (10) of said Act provides as follows:

"13. The provisions of section 6 (wages provisions) and 7 hours provisions) shall not apply with respect to ..... (10) to any individual employed within the area of production (as defined by the Administrator) engaged in handling, packing .... preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market ...."

(1) The Administrator promulgated on October 20, 1938, Section 536.2 of the Regulations, purporting to define "area of production" as follows:

"Section 536.2 'Area of Production' as used in Section 13 (a) (10) of the Fair Labor Standards Act, An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10), in handling, packing, storing, ginning, compressing, pasteurizing, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products,

(a) If he is engaged in such work on a farm and on agricultural or horticultural commodities produced exclusively on such farm, or

(b) If the agricultural or horticultural commodities are obtained by the establishment where he is employed from

farms in the immediate locality and the number of employees in such establishment does not exceed seven.

(2) That regulation remained in effect through April 19, 1939, when following a series of Administrative hearings, he promulgated, effective April 20, 1939, ad additional paragraph to said Regulation 536.2, as follows:

"(e) With respect to perishable or seasonal fresh fruits and vegetables, if he is engaged in handling, packing, storing, drying, preparing in their raw or natural state, or canning such products for maket in an establishment which is located in the open country or in a rural community and which obtains all of its products from farms in its immediate locality. As used in this subsection (e) 'open country' or 'rural community' shall not include any city or town of 2,500 or greater population according to the 15th United States Census, 1930, and 'immediate locality' shall not include any distance of more than 10 miles."

Each of the plaintiffs, when so employed from October 20, 1938, through June 16, 1939, was employed in handling, preparing in their raw or natural state, or canning citrus fruits at the defendant's said establishment where such citrus fruits were obtained by said establishment from farms in the immediate locality.

(3) On June 15, 1939, effective June 17, 1939, the Administrator again amended said Regulation, as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10), in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(a) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven, or

* * * * * * * * *

(d) if he performs those operations on materials all of which come from farms in the immediate locality of the establishment where he is employed and the establishment is located in the open country or in a rural community. As used in this subsection (d), 'immediate locality' shall not include any distance of more than ten miles and 'open country' or 'rural community' shall not include any city or town of 2500 or greater population according to the 15th United States Census, 1940."

Each of the plaintiffs, when so employed from June 17, 1939 through September 30, 1940 was employed in handling, preparing in their raw or natural state of canning citrus fruits all of which came from farms in the general vicinity of the defendant's said establishment where he was so employed.

(4) On July 23, 1940, effective October 1, 1940, the Administrator again amended said Regulation as follows:

"II. An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10), in handling, packing, storing, drying, preparing in their raw or natural state, or canning of perishable or seasonal fresh fruits or vegetables for market:

If he performs those operations on materials all of which come from farms in the general vicinity of the establish-

ment where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten."

(5) On March 12, 1941, effective April 1, 1941, the Administrator again amended said Regulation as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning or agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(a) If he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten, or

(b) With respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this subsection (b), 'first concentration point' means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment normally receiving a portion of the beans assembled or from other first concentration points, or

(c) With respect to Puerto Rican leaf tobacco, if he is engaged in handling, packing, storing, and drying such tobacco for market in an establishment which is a first concentration point for such tobacco. As used in this sub-

section (c), 'first concentration point' means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing."

(6) On October 6, 1941, effective January 5, 1942, the Administrator again amended said Regulation, as it is now currently in effect, as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products;

(a) If he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employes engaged in those operations in that establishment does not exceed ten, or

(b) With respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this subsection (b), 'first concentration point', means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment normally receiving a portion of the beans assembled from other first concentration, or

(c) With respect to Puerto Rican leaf tobacco, if he is engaged in piling, bulking, or otherwise handling un-

stripped tobacco for market in an establishment which is a first concentration point for such tobacco; provided that employees engaged in stripping tobacco or engaged in piling, bulking, or otherwise handling stripped tobacco shall not be deemed to fall within this definition. As used in this subsection (c), 'first concentration point' means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing."

Each of the plaintiffs, when so employed at all times from the effective date of the Act through the period covered by this suit was employed in handling, preparing in their raw or natural state, or canning citrus fruits all of which came from farms in the general vicinity of the defendant's said establishment where he was so employed.

7. The Administrator has consequently failed to define the term of "area of production" as each of said regulations taken in its entirety is void and of no effect for the following reasons:

(a) None of said regulations are predicated upon the proper geographical considerations contemplated by Congress as indicated by the word "area" in the term sought to be defined.

(b) By none of said regulations is the determination of whether an individual is employed within an "area of production" dependent upon the place where he is employed in relationship to the earth's surface.

(c) By none of said regulations is congressional intent given effect.

(d) Each of said regulations reflects an exercise of power by the administrator beyond the limits of the power delegated to him by Congress.

(e) Each of said regulations reflects an exercise of power by the administrator beyond the limits of any power which could be constitutionality delegated to him by Congress through the language contained in this statute.

(f) Each of said regulations is arbitrary, capricious, unreasonable and discriminatory and, therefore, void.

(g) Each of said regulations seeks to change or vary the usual, logical, reasonable and generally accepted meaning of the term "area of production".

(h) The regulations identified in paragraphs 6 (1), 6 (4), 6 (5), and 6 (6) of this defense, hereinafter called the first, second, third, and present size regulations, attempt to confer the exemption upon employees who have few co-employees and to deny the exemption to employees who have more co-employees without regard to the "area" in which either class may be employed.

(i) Each of said regulations have the effect of declaring that for practical purposes there is no area of production of Florida citrus fruit for the reason that not more than seven per cent of all the citrus fruit produced in Florida is handled under the conditions sought to be applied in any of said regulations, though all of said fruit is handled in Florida and in the general vicinity where produced.

(j) The regulations identified in paragraphs 6 (2) and 6 (3) of this defense, hereinafter called the haul-population regulations, attempt to confer the exemption upon

employees who happen to be employed with reference to fruit all of which was hauled from within a particular radius and to deny the exemption to those who happen to be employed with reference to a particular box which might have been hauled beyond that radius, regardless of where either may have been employed.

(k) Said haul-population regulations have no reasonable relationship to the objectives sought to be obtained, as neither the length of haul nor the population of the town in which the establishment may be located bears any rational nexus to the place where the individual is employed, the wages paid, the hours or conditions of work, the type of the establishment, or any other conceivable factor of reasonable classification.

(l) Said haul-population regulations have been recognized by the Administrator to have been invalid, since they were only temporarily in effect, and have now been repealed.

8. The defendant says that all of its produce are obtained from farms in its immediate locality; practically all of the agricultural commodity being obtained from farms within a radius of ten miles from the establishment and that portion obtained beyond ten miles is a very small percentage of the pack of this defendant; that there is produced within a radius of ten miles of the establishment approximately 1,000,000 boxes of citrus fruit each season, being much more citrus fruit than the total quantity annually obtained by the defendant for use in its establishment.

9. Defendant further says that its establishment is located and plaintiffs were consequently employed in the "area of production" of citrus fruit by any reasonable

definition of the term as used in the Fair Labor Standards Act, and that upon failure of the Administrator to properly definite or fix the limits of such "area of production" neither the rights of plaintiffs or defendant can be affected, the same having been fixed by legislative enactment.

10. Defendant further says that its employees to whom this complaint relates, performed all of their services during the times alleged in the complaint, in the "area of production" within the legislative intent.

Thereafter, by leave of Court defendant filed its additional defenses as follows:

First Additional Defense.

This defendant denies that during each and every of the work weeks during the periods of time alleged in the amended complaint this defendant was subject to the Fair Labor Standards Act of 1938.

Second Additional Defense.

This defendant alleges that Section 13 (a) (10) of said Act provides as follows:

"13. The provisions of sections 6 (wages provisions) and 7 (hours provisions) shall not apply with respect to —(10) To any individual employed within the area of production (as defined by the Administrator) engaged in handling, packing, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market—."

(1) The Administrator promulgated on October 20, 1938, Section 536.2 of the Regulations, purporting to define "area of production" as follows:

Section 536.2 'Area of Production' as used in Section 13 (a) (10) of the Fair Labor Standards Act, An individual shall be regarded as employed in the "area of production" within the meaning of Section 13 (a) (10), in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products.

(a) If he is engaged in such work on a farm and on agricultural or horticultural commodities produced exclusively on such farm, or

(b) If the agricultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediately locality and the number of employees in such establishment does not exceed seven.

The said regulation remained in effect through April 19, 1939; that the Circuit Court of Appeals in the case of Fleming vs. Farmers Peanut Company has held the limitation "the number of employees in such establishment does not exceed seven" is void and that during each of the work weeks in which the plaintiffs performed services, this defendant procured the agricultural or horticultural commodities, upon which the plaintiffs performed services, from farms in the immediate locality and, therefore, the defendant was not subject to the Act during each and every of said workweeks.

(2) Following a series of Administrative hearings, the Administrator promulgated, effective April 20, 1939, an additional paragraph to said Regulation 536.2, as follows:

"(c) With respect to perishable or seasonable fresh fruits and vegetables if he is engaged in handling, packing,

storing, drying, preparing in their raw or natural state, or canning such products for market in an establishment which is located in the open country or in a rural community and which obtains all of its products from farms in its immediate locality. As used in this subsection (e) "open country" or "rural community" shall not include any city or town of 2,500 or greater population according to the 15th United States Census, 1930, and "immediate locality" shall not include any distance of more than 10 miles."

The said regulation remained in effect through April 19, 1939; that the Circuit Court of Appeals in the case of *Fleming vs. Farmers Peanut Company* has held the limitation "the number of employees in such establishment does not exceed seven" is void and that during each of the workweeks in which the plaintiffs performed services, this defendant procured the agricultural or horticultural commodities, upon which the plaintiffs performed services, from farms in the immediately locality, and, therefore, the defendant's establishment was in the open country or rural community and was not subject to the Act during each and every of said workweeks.

(3) On June 15, 1939, effective June 17, 1939, the Administrator again amended said Regulation as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(a) If he performs those operations on materials all of which come from farms in the general vicinity of the

establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven, or

* * * * * * * * *

(d) If he performs those operations on materials all of which come from farms in the immediate locality of the establishment where he is employed and the establishment is located in the open country or in a rural community. As used in this subsection (d), 'immediate locality' shall not include any distance of more than ten miles and 'open country' or 'rural community' shall not include any city or town of 2500 or greater population according to the 15th United States Census, 1940."

That during each and every of the workweeks from June 17, 1939 through September 30, 1940, this defendant was within the "area of production" as so defined; that the Circuit Court of Appeals, Fifth Circuit, in the case of *Fleming vs. Farmers Peanut Company,* 127 Fed. (2d) 404 has stricken "the number of employees engaged in those operations in that establishment does not exceed seven"; that the services performed by the plaintiffs and each of them were operations on materials all of which came from farms in the general vicinity of the establishment of this defendant, and this defendant, therefore, claims to be within the exception during each and every of said workweeks. This defendant further avers that the services performed by each and every of the plaintiffs during each and every of the workweeks was on materials which came from farms in the immediate locality of this defendant's establishment, and that the establishment was during each and every of said workweeks located in the open country or rural community, as defined by the Administrator.

This defendant further alleges that during each and every of the workweeks covered by the period of times set forth in the amended complaint, the plaintiffs and each of them were employed in handling, preparing in their raw or natural state, or canned citrus fruits.

The motion filed by the plaintiffs to the Fifth Defense was, by agreement, treated as addressed to the additional defenses and, thereafter granted in the pretrial conference order.

On April 27, 1942, plaintiffs filed their motion to strike addressed to the defenses, the material parts of said motion being as follows:

III.

The plaintiffs move the Court, to strike those portions of the answer entitled "Third Defense" and "Fourth Defense", severally, in their several entireties, upon the following grounds:

A. The matter objected to is redundant, immaterial, impertinent and scandalous, and constitutes no defense to the amended complaint as so amended.

B. The matter objected to is not responsive or relevant to the issues involved in this action, and could not be put in issue or be given in evidence between the parties in answer to the amended complaint as so amended.

C. The said Third and Fourth Defenses, severally, merely set up a legal argument and do not present any issuable defense.

D. Said fourteen work weeks exemption claimed in said defenses has to be claimed and designated by the em-

ployer at the time that the work is done, and cannot be claimed *post litem motam*.

E. It is not set up in the said Third and Fourth Defenses that the defendant ever, prior to this action designated which 14 weeks, or any part of same, in either of said seasons of 1938-39 or 1939-40, it claimed to be exempted. By virtue of the failure of said defendant to designate, prior to the institution of this suit, any week or weeks as part of all of the said fourteen week exemption, said defendant waived said exemption.

F. No facts or circumstances are set up in said Third and Fourth Defenses, or either of them, showing that the defendant is entitled to claim the exemption of 7 (b) 3 of the Fair Labor Standards Act of 1938.

G. In order to entitle itself to said seasonal exemption of 14 weeks, defendant should have claimed said 14 weeks during the said several seasons, and regulated its pay of the employees aforesaid in accordance with such claims so then made. Having made no such claim and having failed to regulate the pay of the employees now suing for any week during either of said two seasons, differing from any other week in either of said two seasons, the defendant is now estopped to claim an exemption not heretofore claimed particularly as the benefits therefor cannot now be equitably applied.

H. The clause of said Fair Labor Standards Act of 1938 referred to, namely, 7 (b) 3, is unreasonable and discriminatory, and does not afford to laborers in seasonal industries the equal protection of the law, as required by the Fourteenth Amendment to the Federal Constitution.

I. The said claimed exemption is unreasonable and unconstitutional for the reason that it discriminates against

the employee, and in favor of the employer, in a particular industry which happens to be designated by the Administrator as seasonal, and, therefore, said provisions for exemption does not afford to the employees equal protection with their employers under the said law. Such exemption is merely an arbitrary discrimination in favor of the employer, without any basis in reason.

There was likewise a motion to strike the Fifth Defense, but after hearing, the Court entered an order, among other things, providing:

7. Since the filing of the answer in this cause, the Circuit Court of Appeals has rendered a decision in the case of Fleming vs. Farmers Peanut Company with reference to a definition or definitions of the Adminstrator of "area of production" and the Court is further of the opinion that the Fifth Defense should be redrawn in view of said decision and the motion to strike the Fifth Defense is therefore granted.

8. It appearing to the Court that the claims of the plaintiffs, if any, depend upon whether the services of the plaintiffs were performed within the "area of production" and that this case may be expedited by a determination of this issue before passing upon the defenses set forth in the Third and Fourth Defenses of the Answer, the Court reserves ruling upon motions to strike the third and fourth defenses of the Answer.

The said Fifth defense was then amended and the original fifth defense is omitted from this record—the amended fifth defense shown.

The motion of plaintiffs to strike the Fifth Defense as amended is as follows:

II,

The entire Fifth Defense as set up in said amendment to said answer and the different portions thereof severally as hereinafter set out, upon the following grounds:

A. The exemption purported to be allowed by Section 13 (a) (10) is unconstitutional in that it is of a classificatory nature, and arbitrarily discriminates between persons and classes, both of employers and employees, not to be properly discriminated between or classified in that manner.

B. The total exemption as allowed by Section 13 (a) (10) of the Fair Labor Standards Act of 1938 is unconstitutional for the reason that there exists no reasonable basis for allowing the exemption to a certain class of employers and against a certain class of employees within the definitions and limitations therein set forth.

C. Said Fifth Defense does not aver that no town of 2500 population according to the applicable Federal census is located within ten miles of the plant of the defendant company.

D. Paragraph 3 of said Fifth Defense is mere argument, and should be separately stricken.

E. Paragraph 5 of said Fifth Defense is wholly irrelavant. It has no bearing upon the issues in this cause. Moreover, it is insufficient and misleading, because it does not deny what is the fact, namely, that the defendant's canning plant cans fruit belonging to many growers and producers who are not members. Moreover, the ownership of stock in the defendant company is of no legal consequence in determining whether the friut that is

canned at the defendant's canning plant comes from the "area of production".

III.

That portion of paragraph VI, consisting of subsections 4, 5 and 6 upon the following grounds:

A. Said sub-section undertake to state respectively the definitions of "Area of production" as promulgated on July 23, 1940, March 12, 1941 and October 6, 1941. All of said definitions were promulgated after the cause of action in favor of the plaintiffs had accrued and matured.

IV.

That portion of said Fifth Defense consisting of paragraph 7 thereof, upon the following grounds:

A. None of the administrator's definitions of "area of production" as defined in this controversy are void for the reasons stated in said paragraph, or any of them, or for any other reason.

B. The Courts have no right to void the administrator's definitions of the phrase "area of production" as involved in this controversy.

C. Ih the administrator's several definitions of "area of production" are void, as set forth in said paragraph, then no exemption 13 (a) (10) exists in favor of the defendant.

D. The defendant's claim of exemption under said Section 13 (a) (10) is inconsistent with, contrary to and repugnant to the claim contained in this paragraph of said amendment to said answer that this definition is

void. Only if the definition is valid, is the defendant entitled to an exemption under 13 (a) (10), Fair Labor Standards Act of 1938.

E. The definitions of "area of production" given by the adiminstrator, and involved in this controversy are not arbitrary, but on the contrary, are reasonable as applied to the citrus industry, having in consideration the nature of the citrus industry, and the circumstances under which the canning operations are carried on in such a seasonal industry.

V.

All of paragraph 8 of the said Fifth Defense, on the following grounds:

A. Said paragraph 8 first claims that all of the agricultural commodity processed by the defendant was obtained from farms in this immediate locality. Thereafter said paragraph 8 contradictorily states that *practically* all of the agricultural commodity processed by the defendant was obtained from farms within ten miles of defendant's plant, and that that portion beyond ten miles *is a very small portion of the pack of the defendant.*

B. Those definitions by the administrator of the phrase "area of production" applicable to this controversy require as follows: The definition set out in paragraph 6 sub-section requires that the (meaning *all* the) agricultural or horticultural commodities be obtained from farms in the immediate vicinity and defines the phrase "immediate vicinity" as not to include any distance more than ten miles. The definition in paragraph 6, sub-section 3, requires that all of the materials come from farms in the general vicinity of the establishment, and be a rural com-

munity which shall not include any city or town of 2,500 or greater population, and that the number of employees engaged in the operations does not exceed seven, and defines the phrase "immediate vicinity" as not including any distance more than ten miles.

C. All of these definitions require not only that all of the products processed by the establishment claiming the exemption come from the *immediate locality*, and define the phrase "immediate locality" as not to exceed ten miles distance from plant, and require that the establishment be located in the open country, and require that the establishment not employ employees in excess of seven.

D. Paragraph 8 of the defendant's Fifth Defense does not aver, nor does any part of the Fifth Defense aver the number of employees was less than seven. In point of fact the number of employees employed by the defendant establishment at the times mentioned in the complaint exceed 200.

E. The averment that *practically* all of the agricultural commodities were obtained from farms within ten miles of the establishment is not a compliance with the requirement of the administrator's applicable definitions of "area of production" that all of the agricultural commodities of the establishment claiming the exemption be obtained from farms within ten miles.

F. The defendant in the Fifth Defense of its *original* answer stated that as much as 10% of the commodities processed within the defendant's establishment came from farms beyond the radius of ten miles of its establishment. This averment in the original answer estops the defendant from claiming now that any less per cent of the said commodities came from farms beyond the radius of ten miles of its establishment.

VI.

That portion of said Fifth Defense consisting of the ninth paragraph thereof, on the following grounds:

A. The defendant here seems to rely upon the proposition that the plaintiffs were employed within the "area of production" *by any reasonable definition of the term* as used in the Fair Labor Standards Act of 1938. The Fair Labor Standards Act does not define the "area of production"—either reasonably or unreasonably. It it not important whether or not the phrase "area of production" was *reasonably* defined by the administrator. If the phrase has been defined by the administrator, and it has, then the definition of the administrator must stand. The Courts cannot make a definition for the administrator, nor can the defendant.

B. The averment that the failure of the administrator properly to define or fix the limits of the "area of production" would not affect the rights of the plaintiffs or defendant is entirely irrelevant, because of the said Fifth Defense avers that the adminstrator has defined the phrase "area of production". Hence the administrator has not failed to define said phrase. The definitions of the administrator applicable to the periods of the employment of the plaintiffs, as set forth in our complaint, are the only definitions with which the Court is concerned at this time.

VII.

Plaintiffs further move the Court to strike that portion of the said Fifth Defense of the answer, as amended, comprising paragraph 10 thereof, on the ground that the same is nothing but a conclusion of law, and entirely argumentative, particularly in the use of the phrase "within the legislative intent".

VIII.

Plaintiffs move the Court to strike the entire Fifth Defense of the defendant's amendment to the answer, upon the following grounds:

A. Said defense purports to set up a total exemption under Section 13 (a) (10) of the Fair Labor Standards Act of 1938, based upon the proposition that the plaintiffs were employed, and that the commodities processed were procured within the "area of production". Thereupon said Fifth Defense avers that there has been no valid definition of the phrase "area of production" by the administrator: Thus the averments of said Fifth Defense seek to eliminate the very total exemption claimed, because said total exemption can only be claimed if the administrator has defined the "area of production" and has thereby given life to the exemption.

If, as claimed by the defendant, there is no valid definition of the phrase "area of production", then there is no exemption available to the defendant under Section 13 (a) (10).

B. In said Fifth Defense, the defendant has not pleaded a set of facts entitling the defendant to a total exemption under Section 13 (a) (10) on the basis of the three separate definitions of "area of production" made by the administrator, quoted by the defendant, and applicable to the controversy herein sued upon.

C. The claim of the plaintiffs is for under-pay and overtime in certain periods of time. Those three several definitions of the administrator covering the particular periods of time to which the claims of the plaintiffs apply, are applicable to the present controversy and not any

present definition. The plaintiffs are seeking damages for past violations of the Fair Labor Standards Act of 1938, and are not seeking injunction against any future violations of the Act as in the case of:

Citation:

Walling, Administrator vs. Farmers Peanut Co. (CCA 5th)—Fed. 2d—

D. In and by said Fifth Defense in the said amendment to its answer the defendant has failed to show that it is entitled to the total exemption set forth in Section 13 (a) (10) of the Fair Labor Standards Act of 1938 because, after setting up the different definitions of "area of production" promulgated by the administrator, it fails to show that the facts exist which entitle the defendant to invoke the exemption. On the contrary, the defendant in and by its said Fifth Defense shows that the commodities were not processed by the defendant at an establish which derived all of its commodities from the "area of production" as so defined.

E. The defendant has not pleaded facts showing itself entitled to the exemption it seeks to claim. For example, administrator's definitions of the pharse "area of production" require, that an establishment to be entitled to the exemption, must have been located in the open country, with no town of 2,500 population within a radius of ten miles. The Fifth Defense does not allege that the establishment of defendant is located in the open country with no town of 2,500 population within a radius of ten miles. The mere allegation that the town of Davenport is within the radius of ten miles, and does not have 2,500 population is not equivalent to an ayerment that there are no other towns within the 10 mile radius that have

a population of more than 2,500. In fact there is a town, namely Haines City within said 10 mile radius which has and has had by the applicable Federal Censuses of 1930 and 1940 a population of more than 2,500.

Again, for example, the administrator's definitions of the phrase "area of production" pleaded and applicable to this controversy allow the exemption only if not more than seven employees shall be employed at the establishment claiming the exemption. There is no averment in the Fifth Defense that not more than seven employees were employed by the defendant at its establishment during the period in controversy. On the contrary, over 200 persons were employed by defendant during said periods, subject to said Fair Labor Standards Act of 1938.

Again, for example, the administrator's definitions of the phrase "area of production" quoted by the defendant and applicable to this controversy state that *all* of the commodities processed at the defendant's establishment must come from the immediate vicinity or locality of the establishment, and defines the phrase "immediate vicinity or locality" as within a radius of ten miles. Yet the defendant has not pleaded that *all* the commodities processed at its establishment came from within a radius of 10 miles of the establishment. On the contrary, the defendant has pleaded that *a portion* of the commodities so processed did not come from within a radius of ten miles. In a previous answer filed by defendant in this cause, defendant showed that the portion of commodities processed at defendant's establishment and derived from farms outside of a radius of ten miles of the establishment, comprised approximately 10% of its total pack.

On October 2, 1942, the Court entered his Order which was filed on the same date denying Motion to Strike

Portions of Defendant's Amendment to Answer in words and figures as follows:

This cause came on for hearing on September 21, 1942 at Orlando, Florida, on plaintiffs' motion to strike certain portions of defendant's amendment to the answer, at which time and place the parties were present by their attorneys, and the Court heard arguments. The portion of the answer sought to be stricken is an affirmative defense by the defendant alleging that Sections 6 and 7 of the Fair Labor Standards Act did not apply to the plaintiffs during the two seasons stated in the complaint for the reason that the plaintiffs were employed within the "area of production" engaged in the operations set forth in Section 13 (a) (10) of the Act The defendant claims that the plaintiffs were within the "area of production" as defined by the Administrator during the different periods to which the different regulations applied, that the plaintiffs during the entire period covered by the suit were engaged in those operations in the general vicinity of defendant's establishment, that if the Court contrues "immediate locality" as used by the Administrator in his definition of "area of production" promulgated on October 20, 1938 to mean a distance of ten miles or less, that the plaintiffs were performing their operations on products obtained from farms in the "immediate locality" of the establishment because practically all of the commodity was obtained from farms within a radius of ten miles; the portion obtained beyond the ten miles being a very small percentage of the pack; that for the same reason the plaintiffs were within the definition of "area of production" as the same was amended by the Administrator on or about April 19, 1939, that for the entire second season referred to in the complaint, the plaintiffs were within the "area of production" as defined by the Administrator on or about June 15, 1939 because the fruit in-

volved came from farms in the "general vicinity" of the establishment, that plaintiffs were within the "area of production" by any reasonable definition of the term, and within the "area of production" within the legislative intent. By paragraph 7 of the Fifth Defense in the Answer, the defendant contends that the definitions of "area of production" by the Administrator are and each of them is void. The Court considers this paragraph as a defense in law and cannot be determined without taking testimony as to the facts to which the law is to be applied.

The Circuit Court of Appeals of the Fifth Circuit in the case of *Fleming vs. Farmers Peanut Company,* 128 Fed. (2d) 404 has held the limitation in the definition of "area of production" by the Administrator as to the number of workers in commerce who work in one establishment is a void limitation. Therefore, this Court holds that any such limitation in any of the definitions involved in this cause is surplusage and does consider the definitions with such limitation deleted.

The Court is of the opinion that its duty is to first determine whether or not the plaintiffs were within the "area of production" as defined by the Adminstrator before passing upon the validity of said definitions or any of them and in order to make such determination it is necessary that testimony be taken on this issue, it is thereupon Considered, Ordered and Decreed:

1. That the plaintiffs' motion to strike portions of defendant's amendment to the answer be and it is hereby denied in its entirety; that by this ruling the Court does not pass upon the validity of the definitions or any of them.

2. That this cause be and it is hereby set down for the taking of testimony before the Court on the 22nd day

of October, 1942 at ten o'clock in the forenoon, at Orlando Florida, at which time the Court will take testimony on the issues of fact raised by the amended Fifth Defense of the Answer and does reserve any ruling on the validity of any of the definitions for further order of this Court.

Done and Ordered at Tampa, Florida, this 2nd day of October, A. D. 1942.

WILLIAM J. BARKER,
District Judge.

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43 TRANSCRIPT OF TESTIMONY.

In the District Court of the United States, Southern District of Florida, Tampa Division.

Wilma E. Addison, Ernestine C. Lyles, Edgar Campbell, Sallie Baker and Luther Black, Plaintiffs,
vs. No. 441-T-C.
Holly Hill Fruit Products, Inc., a Florida corporation, Defendant.

Be It Remembered, that commencing on the 2nd day of December, 1942, at 10 o'clock in the forenoon, in the United States District Court Room, Federal Court House, Orlando, Florida, the above entitled cause was heard by the Honorable William J. Barker, Judge of the above styled Court; that on the trial of said cause, the plaintiffs and defendant, to maintain the issues joined on their respective parts, introduced and offered before the said Court the following oral and documentary evidence, and interposed the objection and took the exceptions herewith noted:

Appearances:

George P. Garrett, Esquire, Ellis F. Davis, Esquire, counsell for plaintiffs.

and

Charles O. Andrews. Jr., Esquire, W. H. Poe, Esquire, R. B. Huffaker, Esquire, G. L. Reeves, Esquire, Counts Johnson, Esquire, counsel for defendant.

(Pages 40 to 91 reported by Mrs. E. S. Wilson.)

The Court:

Proceed.

44 JOHN SNIVELY, JR., called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:

Q. Where do you live, Mr. Snively?

A. Winter Haven.

Q. You are a fruit grower?

A. That's right.

Q. According to the records of the Holly Hill Fruit Products, Inc., Davenport, 571 boxes of King oranges were purchased from you and paid for on January 13th, 1940.

A. I think that is right.

Q. You recall this sale?

A. Yes.

Q. That came from your grove?

A. Yes, sir.

Q. Where is that grove located?

A. It is located just north of Haines City, on the west side of the railroad, about three and a half miles fron Holly Hill Packing House.

Q. Did that fruit come from what is called Power Lake Grove?

A. Yes, sir.

Mr. Huffaker:
That's all.

Cross Examination.

By Mr. Garrett:

Q. That's all the fruit you sold to Holly Hill Fruit Products in the seasons of 1938-1940, or 1939-40?

A. That's right.

Mr. Garrett:
That's all.

(Witness excused.)

45 ALFRED M. TILDEN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:

Q. Mr. Tilden, you live at Winter Haven?

A. Yes, sir.

Q. You are a grove owner?

A. Yes, sir.

Q. It appears from the records of Holy Hill Fruit Products, Inc., that there was purchased from you, through the Grapefruit Distributors, 346 boxes of oranges on January 20th, 1939. Do you remember where that fruit came from?

A. It came from the grove called the Tower Lakes Grove north of Haines City.

Q. About how far from Haines City?
A. About a mile and a half north.
Q. I mean from Davenport.
A. I suppose from the grove to Davenport might be three and a half miles at the outside.

Mr. Huffaker:
That's all.

Cross Examination.

By Mr. Garrett:
Q. Is that all of the fruit you sold, turned over, to the Holy Hill Fruit Products, Inc., during the seasons of 1938-'39, or 1939-40?
A. I think so; just King tangerines we have there. Sold for the juice factor.
Q. How far do you place that grove from Davenport?
A. I would think it was about three and a half miles from the center of the grove to Davenport.

Mr. Garrett:
That's all.

(Witness excused.)

47 B. C. COOK, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:
Q. Mr. Cook, what is your business?
A. Operating in fruit; buying and selling.

Q. Buying and selling fruit and operating trucks?
A. Yes, to canneries.
Q. Mainly selling to canneries?
A. The largest part of it.
Q. Have you been in that business since 1938?
A. Yes, sir.
Q. Located where?
A. Haines City.
Q. It appears from the records of the Holly Hill Fruit Products, Inc., that there was purchased from you, through the Grapefruit Distributors, the following quantities of fruit. Please, note the dates.
11/17/38—2,356 boxes.
11/22/38—2,868 boxes.

Mr. Garrett:
Q. Repeat, please.

Mr. Huffaker:
12/1/38—1,990 boxes.
1/12/39—935 boxes.
4/27/39—5,429 boxes.
5/4/39—1,572 boxes.
6/2/39—125 boxes.
3/30/39—3,532 boxes.

Mr. Huffaker:
Q. Do you remember selling that fruit to the Grapefruit Distributors and delivering it at the canneries of Holy Hill Fruit Products, Inc.?
A. I remember selling him some fruit. I don't remember on what date.
Q. But during that period of time you were selling fruit?
A. Yes, sir.

Q. Well, if their records show that they bought that, that is correct?

A. Yes, sir.

Q. You didn't keep an individual record of the fruit?

A. No, sir.

Q. Where did you buy this fruit mainly?

A. To the best of my knowledge, I buy the most of my fruit from around Haines City, Loughman, Lake Hamilton, Dundee and Davenport.

Q. Did this fruit I have listed come from that territory?

A. Well, I wouldn't be positive, but it should come from around there because the haul is—I try to buy at least 80 to 90 per cent. of my season movement of fruit in and near home.

Q. According to your best recollection, what percentage of this fruit did you buy in this territory you just described?

A. I would say 85 or 90 per cent.

Q. Where did the balance come from?

A. I remember—the only fruit I remember hauling from away from those places, I believe it was after the freeze of 1940; I think we had a freeze; he told me to get him some fruit to put up as citrus salad. I don't remember what month, it must have been around March, and I got it from the Babson Park section. I don't remember how many boxes; a small amount. I believe it was Tom Brown's grove.

Q. In Polk County?

A. Yes, sir.

Q. You spoke of the freeze, did that increase the business of the canneries?

A. I hauled a lot of fruit from around home for juice purposes.

Mr. Huffaker:

That's all.

Cross Examination.

By Mr. Garrett:

Q. You did have records, Mr. Cook, didn't you?

A. No, sir, I didn't never keep a complete record. I always kept the tickets. We operate on a cash basis, and those tickets got destroyed. I took a vacation and put them in a large suitcase, and while I was off my mother needed the suitcase, and didn't know I had the tickets in there, and she had the maid take them out, and I think they may have burned them.

Q. When was that?

A. It must have been around '37, '38, or '39; I am not positive, because I didn't keep any record.

Q. It was in one of those years that the suitcase burned?

A. It must have been.

Q. What about the records since then?

A. Well, I never—I don't keep a complete record; I don't keep where the fruit comes from.

Q. You don't have any record of who you bought from?

A. No, sir, I don't. Only I bought from a lot of growers around Haines City.

Q. You don't know how much you paid, or who you paid it to?

A. No, sir.

Q. You don't make any Income Tax Report?

A. Not until this season. I am keeping a record this season.

Mr. Garrett:

That's all.

Re-Direct Examination.

By Mr. Huffaker:

Q. Mr. Cook, in the season of '38-'39, did you have

any instructions about where you were to get the fruit from Mr. Di Christini?

A. He asked me—I am not positive, but I think he told me to stay in a ten mile area of the cannery.

Q. Did you do that?

A. When was that?

Q. '38 and '39?

A. I believe that I did. I won't be positive. Because I bought a lot of fruit from Strong, Olson, and all those growers.

Q. I want to ask about another season. It likewise appears from the records of the defendant that the following grapefruit was purchased from you through Grapefruit Distributors:

11/21/29—4,883 boxes.
12/16/39—4,418 boxes.
12/29/39—324 boxes.
11/19/40—1,529 boxes.
2/7/40—1,867 boxes.
2/15/40—1,811 boxes.
2/24/40—5,445 boxes.
3/1/40—3,902 boxes.
3/9/40—3,760 boxes.
3/23/40—2,132 boxes.
3/23/40—786 boxes.
3/30/40—1,894 boxes.
4/13/40—2,053 boxes.
4/29/40—5,160 boxes.

Total—40,434 boxes, which added to the boxes I inquired about with reference to the '38-'39 season, makes a total of—there was 18,807. You have testified fully in regard to that number of boxes. Is your testimony the same with reference to this last list of fruit?

A. Please ask that question over.

Q. The same testimony applies to this last fruit?

A. Yes, sir.

Q. Why did your business increase so in 1940?

A. Because I had a few more trucks. In the '40 season?

Q. Yes, the spring of '40?

A. I bought some more trucks.

Q. Did the freeze have any effect?

A. Well, a lot around home, because everybody was anxious to get their fruit off.

Q. Wasn't that practically the only way they could salvage anything out of the fruit? Sell it to the canneries?

A. Yes, sir, lots of them.

Q. A while ago you mentioned that from 85 to 90 per cent. of your fruit sold came from the Haines City, Loughman, Lake Hamilton, Dundee and Davenport territory. That applies mainly to the '39-'40 sales?

A. I can't be positive, but mainly what amount is it applies—I try to do that every year. For the last five or six years I tried—I couldn't be positive. I say that is the best of my knowledge.

Q. The Court wants to know the exact status. There seems to be a little conflict in your testimony. You testified Mr. Di Christini told you to confine operations within a ten mile radius, and you said as far as you know you did comply with that request. Is that true?

A. I would say, to the best of my knowledge, not having any records, I did.

Q. Then, the 85 to 90 per cent. that you purchased in the second season came from that territory, and, possibly, some 10 to 15 per cent. came from Babson Park?

A. I would think so; yes, sir.

Mr. Huffaker:

That's all.

Re-Cross Examination.

By Mr. Garrett:

Q. You have no record?

A. No, sir.

Q. You made no income tax return?

A. Not at that time; I don't think so. No, sir. I am just keeping records this year.

Q. You operated a personal business? You didn't have a corporation?

A. No, sir.

Q. And you bought for cash?

A. Yes, sir.

Q. And where did you get the cash? From the Holly Hill Fruit Products, or was it your own?

A. My father does that. I am just a buyer and salesman for my father.

Q. Is it his business?

A. Yes, sir.

Q. Does he have records?

A. I don't know whether he has a record; I am pretty sure he doesn't have a record of the fruit because that came into the office and I just keep the tickets; I didn't keep records like a packing house.

Q. Did he?

A. No, sir.

Q. What is your father's name?

A. B. C. Cook.

Q. You don't know where this 2,356 boxes on November 17th, 1938, came from?

A. No, sir, I couldn't say.

Q. You don't know anything about any of the fruit?

A. Not positive.

Q. Some of them came from Dundee?

A. Dundee, Florida?

Q. Yes

A. I would think so, yes, sir.

Q. What do you base that on? That you bought some fruit—

A. (Interrupting.) Bought a lot of it around Haines City, Loughman, Lake Hamilton, Dundee, and Davenport.

Q. How far is Dundee from Haines City?

A. I don't know; about 8 or 10 miles, I think.

Q. How far is Haines City south of Davenport?

A. Four miles.

Q. When you are referring to where Dundee is, you are referring to where the local stores are in the community?

A. I would think so. Yes, sir.

Q. There are groves on all sides of Dundee?

A. Yes, sir.

Q. And you bought from groves all around Dundee?

A. From Lake Hamilton and between Lake Hamilton and Dundee.

Q. How far is Babson Park from Dundee?

A. I couldn't say positively, but it is 16 miles to Lake Wales, and I don't know how far it is from Lake Wales.

Q. From Haines City to Lake Wales is 16?

A. Yes, sir.

Q. And Babson is a few miles further?

A. Yes, sir.

Q. How much did you buy in 1940 from Babson Park?

A. The only fruit I remember buying from down in there was P. C. Morrell and Tom Brown. I might have bought from a few more groves in there, but I hauled fruit to different canneries.

Q. How much fruit did you buy from Babson Park to haul to Holly Hill Fruit Products?

A. I don't remember the amount of boxes, not having a record, but it was to put up a citrus salad. Don't know how many boxes they used, and I don't know whether they put every box in it.

Q. Don't know whether it was one thousand or ten thousand?

A. No, sir, I don't.

Q. You said 85 to 90 per cent. of the fruit came from within a 10 mile area. Was that true in '38 and '39?

A. I would think so, yes, sir.

Q. And in 1940 you got more from outside that area?

A. No, I didn't; the only fruit I would think I got from outside the area would be in 1940. I don't believe I got any outside the area in '38 and '39.

Q. When you talk about the area, you mean 10 miles from the packing house of Holly Hill Fruit Products?

A. Yes, sir.

Q. What do you mean? Air distance or road distance?

A. I would think maybe road or either air. I just tried to operate around Loughman, Haines City, Lake Hamilton, Dundee and Davenport.

Q. How far do you put Loughman from Davenport?

A. I really don't know the distance, not to the mile. I don't have a mileage book.

Q. What is your estimate of it?

A. I would think about 7 or 8 miles.

Q. You are including in this area the Dundee fruit?

A. Well, I couldn't be positive where I hauled that Dundee fruit. I do remember some fruit I hauled from Strong, and Olson, and Stiles from Haines City and from Davenport.

Q. You don't know how much?

A. No, sir, I don't.

Q. You don't know how much you paid for it?

A. No, I don't.

Q. You don't know just when you got it?

A. No, sir, I don't.

Q. You didn't take any of it? It was done by people after you bought it? You didn't do the hauling yourself?

A. No, sir, I just did the selling.

Q. You didn't make any contracts with the people that you could produce? Just paid them cash for so many boxes? No written contracts?

A. That's right.

Q. You can't name the people you bought from?

A. I can name the growers that I have handled their fruit for the last five or six years. I might not have handled it every year, but the growers I bought from in that vicinity, I can give you some of them names.

Q. You don't know how much you bought from any one of them?

A. No, sir.

Q. You didn't do any hauling for the Holly Hill Fruit Products where they bought the fruit?

A. I have hauled some for them.

Q. That was all within a ten mile area?

A. Yes, sir, I think so.

Q. All within ten miles of the packing house?

A. Yes, all I hauled for them.

Q. For some reason Mr. Di Chrístini, Manager of the Holly Hill Fruit Products, told you he didn't want you to buy any fruit in '38 and '39 except in the area? Is that correct?

A. That's right.

Q. Did he tell you why?

A. No, he didn't.

Q. You delivered fruit to other canners besides the Holly Hill Fruit Products?

A. Yes, sir.

Q. From the same people?

A. I wouldn't be positive, but I would say so. Yes, sir. From the same groves around there.

Q. These other packing houses didn't tell you to stay within a ten mile limit?

A. No, sir.

Q. And you didn't?

A. No, sir, I didn't.

Q. But when you hauled fruit from a grove for Mr. Di Christini it was within a ten mile limit?

A. As near as I can remember.

Q. But if it was for some other packing house it wasn't necessarily within the ten mile limit?

A. To the best of my knowledge, no.

Q. You live in Haines City?

A. Yes, sir.

Q. Do you know how many people live there?

A. No, not exactly.

Q. How many people live there?

A. About three thousand, I guess.

Q. That's been true ever since the first of 1938, hasn't it?

A. What?

Q. There has been three thousand people there—

Mr. Huffaker: (Interrupting):

Objected to as being immaterial and beyond the issues.

. . . . Argument off the record.

The Court:

He may be permitted to answer.

Mr. Garrett:

Q. Ever since January, '38, there has been three thousand people there?

A. I haven't counted them and I don't keep up with the census.

Q. That is your estimate?

A. I would say somewhere near that.

Q. Haines City is within what distance of Holly Hill?

A. I think it is four miles. I would say about four miles.

Q. Haines City is an incorporated town? You pay city taxes?

A. Yes, sir, my father does.

Q. You came here at the request of Holly Hill Fruit Products?

Mr. Huffaker:

Objected to. It is a matter of record and admitted.

The Witness:

I don't know anything only I just got a subpoena to come to Court and I came up here. I try to tell the truth.

Mr. Garrett:

Q. You never discussed this matter before you came in the Court Room?

A. No, sir.

Q. You haven't talked it over with the lawyers?

A. No, sir.

Q. Had no conversation with them at all?

A. No, sir.

Mr. Garrett:

That's all.

(Witness excused.)

60 JESSE ROBERTS, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:

Q. Where do you live, Mr. Roberts?

A. Haines City.

Q. Are you a grove owner?

A. Yes, sir.

Q. Where is your grove located, Mr. Roberts?

A. About a mile and a half east of Haines City.

Q. According to the records of Holly Hill Fruit Products there was purchased from you a quantity of fruit—grapefruit, during the seasons of '38-'39 and '39-'40. Do you remember selling fruit to that company?

A. Yes, sir.

Q. From what grove did you sell that fruit?

A. That came from what is known as the John E. Stearns grove. That was in Section 32-27-27, which makes it about two miles farther south.

Q. Now, is that true of all the fruit shown on all records that you were paid for—came from that grove?

A. From the two groves. My own grove and the Stearns' grove. My own grove is in the north half of Section 27-27, southwest quarter.

Mr. Huffaker:

That's all.

Cross Examination.

By Mr. Garrett:

Q. Let me locate this a little clearer. You go down the ridge, after you get to Haines City, to get to either of your groves?

A. No. You go toward Winter Haven on the old road just about two miles from the center of the city.

Q. Of Haines City?

A. Yes, sir.

Q. And in order to be hauled to Holly Hill it has to come that two miles to Haines City, and then north to Davenport?

A. Yes, sir.

Q. That is your grove?

A. No, no, that is the Stearns' grove.

Q. Where is yours.

A. A mile and a half east of Haines City.

Q. On what road?

A. Ensign Avenue.

Q. That has to come that mile and a half and then go north?

A. It practically comes in a mile to strike the main road.

Q. You don't happen to know how much you sold to packing house those two seasons?

A. No, not exactly.

Q. Approximately?

A. About 46 boxes were sold and the balance went into the pool.

Q. How much of this went into their packing house?

A. Well, now, I don't know, I think probably 15 or 1,600 boxes of this.

Mr. Garrett:

That's all.

(Witness excused.)

62 H. J. McKEOWN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:

Q. Where do you live?

A. One mile south of Davenport. One mile south of Davenport.

Q. You own a grove there?

A. Yes, sir, and live on the grove.

Q. Do you own any other grove?

A. No, sir.

Q. It appears from the records of Holly Hill Products, at Davenport, that they handled certain grapefruit for you during the season of '38-'39 and '39-'40?

A. That's right.

Q. They did handle that fruit?

A. Yes, sir.

Q. Where did it come from?

A. My grove.

Mr. Huffaker:
That's all.

Mr. Garrett:
No questions

(Witness excused.)

63 HARRY STROHM, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:

Q. Where do you live?

A. Davenport.

Q. You own a grove?

A. Yes, sir.

Q. Where is your grove located?

A. There is one about seven-tenths of a mile from the center of the town, and the other about three and three-tenths from the center of the town.

Q. What direction from the town is the second grove?

A. One is southeast and the other is northwest.

Q. During the fruit seasons of '38-'39, and '39-'40 did Holly Hill Fruit Products, Inc. handle any fruit for you?

A. '39 and '40?

Q. Yes, either one of those two years?

A. Yes, they handled part of it.

Q. If their records show that they handled a quantity of fruit from you where did that fruit come from?

A. Well, part of it came from the grove about three and three-tenths miles, and there was part of it that came from a grove further out, that I believe they put through in my name, that I have charge of for another party; about seven miles northwest of town.

Q. During those seasons, Mr. Strohm, did you sell any fruit from these groves to Mr. B. C. Cook?

A. I have sold Mr. Cook and others, but I can't say definitely it was sold that year, but I believe it was that year of the freeze.

Q. Do you know where he delivered the fruit?

A. No, I do not.

Cross Examination.

By Mr. Garrett:

Q. You never handled, through Cook or the Holly Hill people, from these three groves, is that right?

A. No, there is other groves that I have looked after that Cook has bought the fruit off of.

Q. Where are they located?

A. One of them, just about due west of Davenport about two and a half miles.

Q. All right, the rest of them?

A. There is one south of Davenport about a mile. These groves are not my groves.

Q. Where are the rest of them? Is that all?

A. Just a moment, there was another one at that time about two and a half miles southwest of the town.

Q. Yes?

A. I believe that covers them except what I have mentioned.

Q. Are you connected in any way with Holly Hill Fruit Products?

A. No, sir.

Q. You don't have any cultivation contract with them?

A. Not at present. No.

Q. You did in these seasons?

A. I did two years ago.

Q. Two years ago makes it '40. How long did you have that connection with them?

A. About—I should say about six months, or something like that; six or seven months.

Q. Six or seven months of the season of '39-'40?

A. No, it was '40 and '41.

Q. That is the only time that you had business with them in that relation?

A. Yes, sir.

Q. You are a caretaker as well as owner, are you?

A. To a certain extent, that is, groves belonging to my friends.

Mr. Garrett:

That's all.

(Witness excused.)

66 JOHN WEATHERFORD, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

Mr. Huffaker:

Q. Where do you live?

A. Lakeland.

Q. What is your business?

A. Fruit dealer.

Q. In what way are you a fruit dealer?

A. Buy and sell.

Q. Operate your own truck?

A. Yes, sir.

Q. Do you do business with canneries?

A. Yes, sir, to a great extent.

Q. The records of Holly Hill Products show that they handled, or purchased from you, fruit during the citrus season of '39-'40. Do you recall those dealings? Do you?

A. Yes, sir, I remember selling them some fruit.

Q. Did you have any instructions from Mr. Di Christini as to what territory to handle fruit?

A. Yes, sir.

Q. What did he tell you?

A. To get it within an area of ten road miles.

Q. All this fruit that appears upon the record of Holly Hill Fruit Products, Inc. that was handled for you or purchased from you, what territory did that come from?

A. Well, I have no record of what places it was loaded because I didn't keep records at that time, but I tried to hold it down within ten miles and I am pretty sure I did.

Q. Where were those groves located?

A. Haines City and I think I got some at Lake Alfred, International Fruit, Di Giorgio now, and probably a little from Dundee.

Q. I am speaking about the grove the fruit came from.

A. The grove? I don't believe I hauled any from groves into there.

Q. This fruit you hauled from packing houses, did you make any inquiry to find out where it came from?

A. No, sir.

Mr. Huffaker:

That's all.

Cross Examination.

By Mr. Garrett:

Q. Mr. Weatherford, did you ask Mr. Di Cristini why he put that limitation on?

A. He told me—he said it was some kind of rule, but he said he wasn't supposed to buy fruit from over a certain distance.

Q. So you don't know where the packing house bought it?

A. No, sir, I didn't.

Q. All you delivered to him was packing house fruit?

A. I am pretty sure it was.

Q. This was in the season of '39-'40 after the freeze?

A. Yes, sir.

Mr. Garrett:

That's all.

Re-Direct Examination.

By Mr. Huffaker:

Q. Was any of that fruit bought from Haines City Citrus Growers Association?

A. I didn't keep the record. He told me—

Q. (Interrupting.) Do you remember if you bought any fruit from that association?

A. I bought quite a lot of fruit from the Association, but I don't remember if any of it went to them or not.

Q. You know that the Haines City Citrus Growers is a co-operative and that the members' groves are near Haines City?

A. Yes, most of them are; right in there.

Q. The packing house at Lake Alfred, who ran that?

A. It was the Exchange at that time. It is Lake Alfred Packing Company now.

Q. What other one now?

A. The International Fruit, Lucerne Park. It's Di Giorgio now.

Q. Mr. Weatherford, do you know of the fact that the International Fruit Company groves are in a combine?

A. Well, they have some building around at Lynchburg. They have groves scattered all around that vicinity, and they have groves in the northern part of the state.

Q. You didn't buy any up there?

A. No, I said I got it some place closer.

Q. Do you know of any groves the International owns beyond Lucerne Park and Auburndale?

A. No, I don't think so.

Mr. Huffaker:

That's all.

Re-Cross Examination.

By Mr. Garrett:

Q. How far is Lake Alfred from Haines City south?

A. I don't know; I don't know just how far; ten or twelve miles.

Q. And Haines City is four miles south of Davenport?

A. About that.

Q. How far is Lucerne Park southeast of Haines City?

A. I imagine about six miles.

Q. And this International packing house was at Lucerne Park?

A. It is all the same.

Q. And the other was at—

A. (Interrupting.) Dundee.

Q. You got some from the International at Dundee?

A. Yes, sir, I buy from those houses every year.

Q. How far is Dundee east, or southeast of Haines City?

A. Seven or eight miles; something like that.

Q. How far is Auburndale south of Haines City?

A. That is fifteen, I imagine.

Q. And the way you haul in your trucks, you would haul from these points to Haines City and Haines City north to Davenport?

A. That's right. I don't remember taking any from Auburndale.

Q. You don't know where the fruit came from?

A. I picked it up at the packing house.

Q. The Lynchburg Grove is slightly south of Lake Alfred?

A. It is over to the right of Lake Alfred, over towards Auburndale.

Q. Which town is it closest to?

A. I believe it is closest to Lake Alfred.

Q. How many miles?

A. Oh, a couple of miles.

Mr. Garrett:

That's all.

(Witness excused.)

70 MRS. V. J. MARTIN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:

Q. Mrs. Martin, you live in Davenport?

A. Yes, sir.

Q. Is your home inside the town limits?

A. Yes.

Q. How long have you lived there?

A. Six years.

Q. Do you own any groves in that territory?

A. We own one grove and lease three others.

Q. Where is the grove you own?

A. In Davenport.

Q. Where are the three leased ones?

A. They are out on the Holy Hill drive.

Q. About how many miles?

A. The farthest away is five miles.

Q. It appears from the records of Holly Hill Fruit Products, Inc. that during the seasons '39-'40 they handled certain fruit for you. Do you recall if that is true?

A. Yes.

Q. What groves did that fruit come from?

A. From the 40 acre grove five miles from Davenport, and there is another small grove about four miles.

Q. You sold this fruit direct, did you?

A. We sold it through what they call the pool.

Q. In addition to the sale of this fruit did you sell any to Mr. B. C. Cook?

A. Not that I recall.

Mr. Huffaker:

That's all.

Mr. Garrett:

No questions.

(Witness excused.)

72 C. C. SPENCER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:

Q. I believe you live at Haines City?

A. Yes, sir.

Q. Are you a grove owner?

A. Haines City Heights, Incorporated; I am manager.

Q. You manage it?

A. Yes.

Q. Is that a grove proposition?

A. Yes, sir.

Q. How many acres?

A. Well, there is 350 acres in the grove.

Q. Where is it located?

A. This particular—

Q. (Interrupting.) I don't want the legal description.

A. North of Haines City.

Q. How far north?

A. 80 acres within the city and the balance joins it.

Q. 220 beyond it?

A. All joined together.

Q. It appears from the records of Holly Hill Fruit Products that they handled for you certain fruit during the season of '38-'39. Do you recall that they did?

A. Yes, a small amount.

Q. What grove did that come from?

A. The Haines City Heights Grove.

Q. You don't recall which part of the grove? Whether it was in the city limits or not?

A. Yes, it came out of the eastern part of the northeast of northeast 20-27-27.

Mr. Huffaker:

That's all.

Cross Examination.

By Mr. Garrett:

Q. Mr. Spencer, did you make it a practice to sell this fruit from that grove to the Holly Hill Fruit Products, Inc:?

A. That is the only sale I have made to them.

Q. As a matter of fact, is your grove on a good road running into Haines City?

A. Yes, sir.

Q. There are two, three or four packing houses there in Haines City, aren't there? Are you a member of the Haines City Association?

A. No, I am independent.

Q. Do you usually sell to those Haines City people?

A. No, I wouldn't say generally. We generally sell to anyone that comes along—

Q. (Interrupting.) Depending on the best price?

A. Yes, sir.

Q. How long have you lived there?

A. Since '20.

Q. How many people live there?

A. About 3,500.

Q. Has that been so since the first of January, '38?

A. Yes, I would think so.

Q. Haines City is about how far from Davenport? Air miles?

A. About three miles, air miles, I should say.

Q. How many road miles?

A. About four.

Q. Haines City in an incorporated town, isn't it?

A. Yes, sir.

Q. It has been since January 1st, '38, is that right?

A. I don't know when.

Q. I mean long before that?

A. Way on back of that, yes.

Q. Would you describe your grove as in the general vicinity of Haines City?

A. Well, I believe that that lay-out was laid out by the Holly people. It is laid out in five acre tracts. It is closer to Holly Hill.

Q. Closer to Holly Hill than Haines City?

A. No, it is not closer than Haines City, but I think it is a part of what was laid out for Holly Hill.

Q. Which is it closer to?

A. I imagine to Haines City.

Q. Part of it is in the corporate limits?

A. No, but not that particular forty this came out of.

Q. On part of that grove you pay city taxes to Haines City, don't you?

A. Yes, sir.

Q. It is in the immediate locality of Haines City, isn't it?

A. Oh, yes.

Mr. Garrett:

That's all.

(Witness excused.)

75 MRS. ALEXANDER WARREN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:

Q. Mrs. Warren, do you live in Haines City?

A. Yes, sir.

Q. How long have you lived there?

A. Well—

Q. (Interrupting.) Since 1938, isn't it?

A. Yes, sir.

Q. Before 1938?

A. Yes, sir.

Q. You own some groves at Haines City?

A. Yes, sir.

Q. I believe they are right around Haines City? Right in Haines City?

A. Well, they are right around Haines City. I have one in Haines City.

Q. All in less than ten miles of Davenport?

A. Yes, as the crow flies.

Q. During the season of '40 it appears the Holly Hill Fruit Products, Inc. handled some grapefruit for you. Do you recall that?

A. Yes. I don't know the years, but I know they handled some.

Q. Did they handle it more than one time?

A. I don't think they did.

Q. One season?

A. Yes, sir.

Q. That was after the freeze in 1940 that you sold the grapefruit? Anyway, it was one of those years?

A. One of those years; I couldn't tell you, but they have the accounts.

Q. They have a record of all that fruit? Where did that fruit come from?

A. From a grove just beyond—a little beyond the city limits.

Q. Which direction?

A. The Cemetery Road, we call it; that is east.

Q. Right east of it? Grapefruit grove, isn't it?

A. Yes, sir.

Mr. Huffaker:

That's all.

Cross Examination.

By Mr. Garrett:

Q. All these groves are in the immediate locality of Haines City, aren't they?

A. All but this, I would say.

Q. Where are those?

A. They are down on what is called the Kokomo Road.

Q. Is that towards Davenport or the other way?

A. Well, I couldn't tell you; I go towards Lake Hamilton.

Q. How far from Haines City are those groves?

A. As the crow flies?

Q. No, as the road runs?

A. As the road runs, I think six miles.

Q. How far do you put Davenport from Haines City by the road?

A. From this grove?

Q. No, from Haines City.

A. Well, I have never looked at the mileage. I would say not over four miles.

Q. But the particular grove that this fruit was sold off was on the Cemetery Road?

A. Yes, sir.

Q. Inside or outside the city limits of Haines City?

A. Outside.

Q. You have lived in Haines City quite a number of years?

A. Yes, sir.

Q. About how many people live there?

A. At the present time?

Q. Yes.

A. I haven't heard the census but I guess I would be safe in saying 3,000.

Q. That has been true since the first of January, '38? There hasn't been any—

A. (Interrupting.) Yes. A good many people have gone, out for work, now.

Q. Well, there were more then?

A. Well, there are a number of families moved away to do work elsewhere.

Q. There are less people now than any time since the first of '38 in your opinion?

A. Well, I say, yes, in my opinion.

Q. There are about 3,000 now?

A. Well, I think so.

Q. And Haines City is in the center of a citrus producing area, isn't it?

A. It is considered so.

Q. There are a lot of packing houses right there at Haines City?

A. There are only two operating.

Q. Which are those?

A. The Haines City Citrus Growers and the American Fruit Growers.

Q. And your grove is in the immediate locality of those two packing houses?

A. Very close, yes, sir.

Mr. Garrett:

That's all.

(Witness excused.)

79 J. A. LANGLEY, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:

Q. Where do you live?

A. Haines City.

Q. Have you lived there a number of years?

A. Yes, sir.

Q. Are you a grove owner?

A. Yes, sir.

Q. In addition to being a grove owner yourself, do you handle fruit for any other people?

A. Yes, sir.

Q. As a broker or caretaker?

A. Caretaker.

Q. You are in the caretaking business?

A. Yes, sir.

Q. Where is your own grove located?

A. One in Haines City, one in Auburndale.

Q. In the City of Auburndale?

A. No, outside.

Q. Which direction?

A. East of Auburndale.

Q. Where are the groves you take care of?

A. All around Haines City.

Q. In the Haines City territory?

A. All that I take care of.

Q. It appears from the records of Holly Hill Fruit Products, Inc. that during the season of '40 they handled some grapefruit, considerable grapefruit, for your account. Do you recall that they did?

A. Yes, sir.

Q. You sold it to them?

A. Yes.

Q. What groves did it come from?

A. Well, I could hardly tell you. In my own groves—other people's; I don't have any record.

Q. Were those groves in the Haines City territory this fruit came from?

A. Most of them were; one probably wasn't.

Q. Which one?

A. The one at Hesperides.

Q. How much came from Hesperides?

A. Well, I could hardly say how many boxes. I didn't keep a record.

Q. The comparative quantities? It appears that there was handled for you a total of 2,496 boxes?

A. Probably, a third of it.

Q. And the other two-thirds from Haines City?

A. Haines City territory.

Q. Hesperides is six or eight miles south of Lake Wales?

A. I don't know exactly; something like that.

Q. Is it south of Lake Wales?

A. Yes, sir.

Mr. Huffaker:

That's all.

Cross Examination.

By Mr. Garrett:

Q. South of where? Lake Wales?

A. Yes, sir.

Q. How far is Lake Wales south or southeast of Haines City?

A. I don't know; they claim about 17 miles.

Q. These groves you take care of are in the immediate vicinity of Haines City?

A. I should say within a radius of 10 miles.

Q. North, or east, or where?

A. All around Haines City.

Q. Some of them would be 10 miles east, and some 10 miles south? Is that right?

A. Well, probably so; I don't know whether it would be that much or not.

Q. You don't know from what particular grove you sold this particular grapefruit?

A. No, I couldn't tell you that.
Q. You live at Haines City?
A. Yes, sir.
Q. How long?
A. Since 1927.
Q. How many people live there?
A. I don't know.
Q. Well, have you got a guess? Are there as many as 3,000?
A. I think they claim 3,500.
Q. That's been the same since 1938, hasn't it?
A. I think so.
Q. There are packing houses there at Haines City, are there not?
A. Yes, sir.
Q. Are these packing houses nearer or further away than the Holly Hill Packing House?
A. We think it is nearer.
Q. You would put the whole of these groves as centering around Haines City?
A. Yes, they center around Haines City.
Q. Davenport isn't as big as Haines City, is it?
A. No.

Mr. Garrett:
That's all.

(Witness excused.)

83 N. H. STILES, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:
Q. Where do you live?

A. Haines City.

Q. How long have you been living there?

A. A little over 19 years.

Q. Are you a grove owner?

A. Yes, sir.

Q. How many groves have you?

A. Two.

Q. Where are they located?

A. Within the city limits of Haines City.

Q. It appears from the records of Holly Hill Fruit Products, Inc. that in the 1940 season they handled a small amount of grapefruit for you. Do you recall the circumstances?

A. Yes, sir.

Mr. Garrett:

What season?

Mr. Huffaker:

1940.

Mr. Huffaker:

Q. What grove did that fruit come from?

A. I think it possibly come from both groves; I am not positive. I sold it to Mr. Cook, and I know he sold them to Holly Hill, and—

Q. (Interrupting.) They dealt direct with you, didn't they? The Holly Hill people?

A. I am not sure. For the last five years, sometimes I dealt direct, and sometime I sold to Mr. Clark.

Q. If during 1940 the records of Holly Hill Fruit Products, Inc. show that they purchased certain fruit from you and the check was issued to you, that would be fruit that was picked from those two groves—

A. (Interrupting.) Yes, sir.

Q. (Continuing.) —and nowhere else?

A. No, sir.

Q. Your groves are in the immediate locality of Davenport?

A. Well, I would say that Davenport is along about four miles from Haines City.

Q. I think that is all. Did you have a rain yesterday?

A. Very likely; last night.

Mr. Huffaker:

That's all.

(Witness excused.)

85 MRS. H. EVANHOUSE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:

Q. I believe you live at Haines City?

A. Yes, sir.

Q. How long have you lived there?

A. 18 years.

Q. Do you own a grove?

A. Yes, sir.

Q. Where is that grove located?

A. Well, one grove is in the city limits, and the other grove is out of the city limits, but just the description—

Q. (Interrupting) I don't want the legal description. What direction from Haines City?

A. East of Haines City.

Q. How far east?

A. Between six and seven miles.

Q. Close to Davenport, then?

A. Yes, sir.

Q. Do you remember whether or not during 1940 the Holly Hill Fruit Products, Inc. handled some grapefruit for you?

A. Vaguely I do; yes.

Q. If their records show that they had dealings with you and paid you for fruit, where would that fruit come from?

A. I, personally, can't tell you; my husband took care of the business at that time, and I don't know which grove.

Q. You own the groves, do you?

A. Yes, sir.

Q. Your husband didn't sell any fruit from any other groves?

A. Yes.

Q. He didn't deal in fruit or sell—it would be from one of the two groves?

A. No, sir.

Mr. Huffaker:

That's all.

Cross Examination.

By Mr. Garrett:

Q. One of these groves is in the city limits of Haines City?

A. Yes, sir.

Q. And where is the other?

A. East of Haines City.

Q. How far is this other grove from Davenport?

A. Well, I would say between three and four miles.

Q. Then it must be northeast of Haines City?

A. I presume so, yes; it is closer to Davenport than Haines City.

Q. It is between the two, is that right?

A. Yes, sir.

Q. The other is in the immediate locality of Haines City, is that right?

A. Yes, right in the city limits.

Mr. Garrett:

That's all.

(Witness excused.)

87 N. A. MIXON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:

Q. Where do you live, Mr. Mixon?

A. Where do I live?

Q. Yes, sir?

A. Lake Hamilton.

Q. How long have you lived there?

A. About 28 years.

Q. Are you a grove owner?

A. Yes, sir.

Q. How many groves have you, Mr. Mixon?

A. Of my own, I have but one—two, but I have had in my charge there about, well, from 70 to 120 acres for the last fifteen years.

Q. Those groves you took care of, where are they located?

A. Right in the Lake Hamilton section there. They are all right around the town except one at Haines City.

Q. That is sufficient. The records of Holly Hill Fruit Products, Inc. show that they handled certain grapefruit for you, a quantity of grapefruit for you, in the season of '38?

A. '38?

Q. Yes. Do you recall that they did handle some fruit for you?

A. Well, I think so.

Q. The records show that the dealings were with you and the check made to you, where did that fruit come from?

A. It came from those groves right there in that section; the ones I have charge of; in '38.

Q. Your own groves and others?

A. Yes, sir.

Q. It appears from the records that the Holy Hill Fruit Products had dealings with Mixon & Company and handled that—

A. (Interrupting.) Was that in '38 or '39?

Q. We have here 1938.

A. I think it was '39 that I handled a little fruit, that is, he did the hauling.

Q. Who did the hauling?

A. A man by the name of Cox.

Q. He was a partner of yours?

A. Well, he was hauling fruit that he bought on my bond. I am under bond—

Q. (Interrupting.) Where did that fruit come from?

A. All came right in there with the exception of a few loads just beyond Dundee there.

Q. Just across the marsh from Dundee?

A. Well, toward the Eloise Loop.

Q. It was outside the Eloise Loop, beyond the Eloise Loop?

A. Before you get into the Eloise Loop, but just across from Dundee.

Q. How many miles west of Dundee?

A. I would say somewhere around four miles.

Mr. Huffaker:

That's all.

Cross Examination.

By Mr. Garrett:

Q. All of these groves you took care of were right in the Lake Hamilton section, is that right?

A. Yes, right around the town.

Q. Lake Hamilton is a little town—a little to the east of Haines City?

A. South of Haines City.

Q. About how far?

A. Between five and six miles.

Q. Where is Dundee compared with Lake Hamilton? Further on, isn't it?

A. One mile further south.

Q. Are those towns incorporated?

A. Both of them; come together—

Q. (Interrupting) Both have packing houses, don't they?

A. Yes, sir, Dundee has a packing house. Lake Hamilton has been closed for years.

Q. You'd say that these groves were in the immediate locality of Lake Hamilton, is that right?

A. That is right.

Q. In order to get to Davenport you would have to come in from Dundee or Lake Hamilton to Haines City and then go north?

A. That is right up to Haines City and then to Davenport.

Q. How far would it be from Haines City to Davenport?

A. I think four miles.

Q. You add that to the distance to Lake Hamilton?

A. Yes, sir.

Q. And that's between five and six miles?

A. Somewhere like that.

Q. Your groves were not in the main part of town?

A. A little more east of Lake Hamilton.

Q. Further away from Haines City?

A. No, they would have been closer to Haines City.

Q. Then, they wouldn't be east, would they?

A. They lay east but a little north of east.

Q. But you come into Lake Hamilton before you go to Haines City and Davenport when you haul fruit?

A. That's right.

Q. And how far northeast of Lake Hamilton?

A. Oh, it wasn't really northeast, but they were on the east side.

Q. Well, how far?

A. I don't know. The lower side of the incorporation. I suppose about a mile or two miles.

Q. What do you mean by the lower side? The one nearest Haines City?

A. The one farther south.

Q. You don't know how much of this fruit came from further groves?

A. No, I couldn't give you that. I don't keep any records, as cash put out, any more than those tickets.

Q. That is true of the N. A. Mixon Company stuff, the same as N. A. Mixon?

A. Well, I don't know about that company. But it was all supposed to be mine, but this man did the hauling for me.

Q. And what you sold to the Holly Hill Fruit Products, Inc., was grapefruit—after the fruit came from any of these groves that you happened to have a chance to sell?

A. Just when I had a chance.

Mr. Garrett:

That's all.

(Witness Excused.)

92 JAMES EDWARDS, Called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:

Q. Where do you live?

A. Just out of Dundee, Florida.

Q. Which direction?

A. It would be almost due east.

Q. You have lived there a number of years?
A. Yes, sir.
Q. Grove owner?
A. Yes, sir.
Q. Where are your groves located?
A. I have one inside the city limits; ten acres on the Lake Hamilton side.
Q. The records of Holly Hill fruit Products, Inc. show that there were purchased from you, or handled for you, certain grapefruit in 1940. Do you remember the occasion?
A. I do.
Q. Where was that fruit picked?
A. From the Dundee grove.

Mr. Huffaker:
That's all.

Cross Examination.

By Mr. Garrett:
Q. Where is this Dundee grove in relation to the center of town?
A. It's possibly six blocks from the center of town; possibly, eight blocks.
Q. Which direction?
A. About half of it east and the other half south.
Q. When you haul fruit from there to Davenport you haul it into Dundee and then north from Haines City to Davenport, is that right?
A. Yes, sir.
Q. Well, actually this grove is in the immediate Locality of Dundee?
A. Yes, sir.
Q. Dundee has a packing house, hasn't it?
A. It has a packing house, yes, sir.
Q. Dundee is how far from Haines City?

A. Supposed to be three miles.

Q. Only three miles from Haines City or Lake Hamilton?

A. From Lake Hamilton.

Q. From Haines City?

A. About seven; I think that is what the poster in the center of the street says.

Q. Seven miles, Dundee to Haines City?

A. Yes, sir.

Q. And Haines City to Davenport is about four, is that right?

A. I couldn't say for sure.

Q. You are not familiar with that distance?

A. I have traveled it lots of times, but I really don't know.

Q. The two packing houses—at Dundee, and the packing house at Haines City were being operated at the time you sold this fruit at Davenport?

A. One at Haines City.

Q. And one at Dundee?

A. Yes, sir, one at Dundee—the Exchange.

Mr. Garrett:
That's all.

(Witness Excused.).

94 R. M. BIELING, Called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:

Q. Where do you live?

A. East of Lake Hamilton.

Q. You own a grove there?

A. Yes, sir.

Q. It appears that in '38 the Holl Hill Fruit Products, Inc. handled a small number of boxes of grapefruit for you.

A. Yes, sir.

Q. Where did that fruit come from?

A. Off my own grove.

Q. East of Lake Hamilton?

A. Yes, sir.

Mr. Huffaker:

That's all.

Cross Examination.

By Mr. Garrett:

Q. How far is your grove east of Lake Hamilton?

A. About three miles from the post office, but it is a little northeast of Lake Hamilton.

Q. So when they hauled that fruit to Davenport they hauled it three miles in to Lake Hamilton and then to Haines City and then to Davenport?

A. No, sir.

Q. How did they haul it?

A. I hauled it myself. I hauled it up to the hard road and then in through Haines City; I left off a mile.

Q. How far did you travel in order to get to Davenport?

A. I couldn't tell you that.

Q. How far to get to Lake Hamilton?

A. Two miles to get to the hard road.

Q. Then, how far to Haines City.

A. About three miles from the filling station where we turn there to Haines City.

Q. When you got to Haines City you went through the town, is that right?

A. Straight on to Davenport, yes, sir.

Q. Your fruit is in the immediate locality of Lake Hamilton?

A. Yes, sir.

Q. It is nearer to Haines City than it is to Davenport?

A. Why, certainly.

Mr. Garrett:

That's all.

(Witness excused.)

96 JULIUS MATTSEN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:

Q. You live at what place?

A. I used to live on what they call Lake Hamilton Road.

Q. Were you living there in '38?

A. Sure.

Q. Where is your grove located?

A. Right at the house.

Q. On Lake Hamilton Island?

A. Yes, sir.

Q. Do you recall the deal with Holly Hill Fruit Products, Inc. in 1938 to handle some of your grapefruit?

A. No; it comes right down to it; it wasn't. It was the fellow what stayed in the garage. The best I can remember, he went to work and picked up the drops.

Mr. Garrett:

I will agree that they handled it if the books show it.

Mr. Huffaker:

Q. The books show that they bought the fruit and you were paid for it.

A. I don't know if it all came from it, because I gave it to the fellow or charged a little for the drops. But he picked drops from other groves.

Cross Examination.

By Mr. Garrett:

Q. Where is your grove? Where is Lake Hamilton Island?

A. In Section 8—

Q. (Interrupting) No, how far from town? How far from the nearest town?

A. About four and a half from Haines City.

Q. Which way?

A. It is south on west.

Mr. Garrett:

That's all.

Mr. Huffaker:

Q. Give me the section, township and range?

A. Section 8, 27, 28.

Mr. Huffaker:

That's all.

(Witness excused.)

97 TOM KEEGAN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:

Q. Where do you live?

A. I live in Dundee.

Q. Are you a grove owner?

A. Yes, sir.

Q. Where is your grove located?

A. I would say about half a mile south of Dundee.

Q. It appears from the records of Holly Hill Fruit Products, Inc., that in the years 1940 and 1939 they handled certain fruit for you?

A. Yes, sir.

Q. What grove did that come from?

A. It came from that grove.

Q. From your own grove a half mile south of Dundee?

A. Yes, sir, I would say it is between a quarter and a half. I wouldn't say a full half.

Mr. Huffaker:

That's all.

Cross Examination.

By Mr. Garrett:

Q. Your grove is right in the immediate locality of Dundee?

A. Yes, sir, within the city limits.

Mr. Garrett:

That's all.

(Witness excused.)

99 PAUL SWANSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:

Q. Where do you live, Mr. Swanson?

A. Live in Lake Hamilton.

Q. How long have you lived there?

A. Ten years.

Q. Are you a grove owner?

A. Yes, sir.

Q. Where is your grove located?

A. Just east of Lake Hamilton; a mile east.

Q. The records of Holly Hill Fruit Products, Inc. show that they handled certain fruit for you in 1940. Grapefruit.

A. Yes, sir.

Q. Do you recall the circumstances?

A. Yes, sir.

Q. What grove did that come from?

A. From the grove where I live; the only grove I own.

Mr. Huffaker:

That's all.

Cross Examination.

By Mr. Garrett:

Q. In delivering that fruit to the Davenport packing house, it would be taken one mile into Lake Hamilton and then carried to Haines City then north to Davenport?

A. That's right.

Q. This grove of yours is in the immediate locality of Lake Hamilton?

A. Yes, sir.

Q. Where are the nearest packing houses?
A. Well, at Dundee would be the nearest that is operating.
Q. Haines City packing houses are nearer than the Davenport?
A. Yes, sir.

Mr. Garrett:
That's all.

Re-Direct Examination.

By Mr. Huffaker:
Q. At that time was there a cannery at Dundee?
A. I am quite sure there was.

Mr. Huffaker:
That's all.

(Witness excused.)

100 RALPH SMITH, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:
Q. I believe you live at Dundee?
A. Yes, sir.
Q. Are you a grove owner?
A. No, sir.
Q. What is your relation to the grove business?
A. Well, buy and haul fruit.
Q. How many trucks do you operate?
A. Four at the present time.

Q. How many in 1940?
A. Two.
Q. 1939?
A. Two.
Q. Do you buy grapefruit and sell it to canneries?
A. Yes, sir.
Q. The records of Holly Hill Fruit Products, Inc., show that they handled grapefruit for your account, or bought grapefruit in 1939. Where did you get that fruit?
A. That came from Mr. Hornsby's grove.
Q. Where is that grove?
A. On Kokomo Road out from Lake Hamilton.
Q. A county road runs east from Lake Hamilton?
A. I couldn't say if it is a county road.
Q. Well, it runs east?
A. Yes, sir.
Q. That grove is located how far from Dundee? The approximate number of miles?
A. I should say about three back up this way (indicating).
Q. East or northeast?
A. You come a mile, or a little better, this way, (indicating), and turn to the left.

Mr. Huffaker:
That's all.

Cross Examination.

By Mr. Garrett:
Q. How did you haul that fruit to Holly Hill, take it Dundee, then to Haines City, and then to Davenport? Or some short cut?
A. I came from the grove to Lake Hamilton, to Haines City, to Davenport.
Q. How far was it from the grove to Lake Hamilton?
A. Well, I don't know exactly.

Q. Give me an estimate?

A. Maybe a couple of miles.

Q. From Lake Hamilton to Haines City?

A. Well, I still don't know exactly that distance, but it would be maybe four miles.

Q. And then from Haines City to Davenport, how far? I mean to this packing house?

A. Maybe four miles.

Q. And this grove that you are talking about, what was the name of the man that owned this?

A. Hornsby is his last name; I don't know his first name.

Q. In the immediate locality of Dundee?

A. No, sir, Lake Hamilton.

Mr. Garrett:

That's all.

(Witness excused.)

103 D. J. COSTNER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Huffaker:

Q. Where do you live, Mr. Costner?

A. Live three miles south of Davenport, about that, on a grove.

Q. In 1940 did you have any relations with Mr. Mabson?

A. Sure, H. B. Mabson.

Q. What was your relation? Grove caretaker?

A. Yes, sir, caretaker.

Q. You took care of the Mabson grove located in Section 8-27-27?

A. Yes, sir, close to three miles from Davenport.

Q. Three miles south?

A. Yes, sir.

Q. Do you remember that Holly Hill Fruit Products during 1940 handled certain fruit from the Mabson Grove?

A. Yes, they got some oranges.

Q. Did you have anything—supervising the picking and so forth?

A. Sure.

Q. All those oranges came from the Mabson grove?

A. Yes, sir.

Mr. Huffaker:
That's all.

Mr. Garrett:
No questions.

(Witness excused.)

The Court:
The Court will be in recess until 2 o'clock.

(After Recess—2:00 P. M.)

(Page 91 to 150, reported by E. Marshall Stifel.)

The Court:
You may proceed.

104 R. B. HUFFAKER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Reeves:

Q. You are Mr. R. B. Huffaker?

A. I am.

Q. Of Bartow?

A. Yes, sir.

Q. Mr. Huffaker, you are of counsel in this case, also?

A. Yes, sir.

Q. And you know the defendant is the Holly Hill Fruit Products, Inc., a Florida corporation?

A. Yes, sir.

Q. Do you have any connection with the corporation other than as counsel?

A. I am senior vice president, a member of the board of directors, and attorney for the company.

Q. Do you know when the company was incorporated?

A. The company was originally incorporated under the general incorporation law of 1925 either in the latter part of 1928 or 1929, and then it was re-incorporated under the 1931 Co-operative Act.

Q. And did you handle both of those incorporations?

A. Yes, I have done all of the legal work for the corporation since it was organized.

Q. When was it first organized?

A. Either 1928 or 1929; I believe 1928.

Q. How long have you held a position as director or officer of the corporation?

A. I couldn't state right off hand; I believe, at least, ten years.

Q. During that period of time have you had occasion to familiarize yourself with the general set up of the company?

A. I have.

Q. I hand you an instrument and ask you to identify it, please, sir (handing paper to witness).

A. This is a certified copy of the articles of incorporation of Holly Hill Fruit Products, Inc.

Mr. Reeves:

We offer this in evidence as Defendant's Exhibit No. A.

Mr. Garrett:
No objection.

The Court:
Let it be received.

. . . Thereupon, the document last referred to was admitted in evidence and marked Defendant's Exhibit No. A.

Mr. Reeves:
Q. (Handing paper to witness) And this one?
A. This is a certified copy of the by-laws of the Holly Hill Fruit Products, Inc.

Mr. Reeves:
We offer this in evidence as Defendant's Exhibit No. B.

Mr. Garrett:
No objection, go ahead.

The Court:
Let it be admitted.

. . . Thereupon, the document last referred to was admitted in evidence and marked Defendant's Exhibit No. B.

Mr. Reeves:
Q. Mr. Huffaker, I hand you herewith what purports to be a map (handing paper to witness). Will you identify that, please, sir.

A. This is a printed map from an official map of Polk County prepared by Lenord Trickle, engineer, drawn to scale—drawn to the scale customarily used in Polk County to locate lands and property.

Q. Now, I notice on this map that there have been some circles drawn in pencil. What are they?

A. Those are concentric circles drawn to a radius of 25 and 30 miles.

Q. Do you mean—

A. (Interrupting) 10, 15 and 25 miles.

Q. And have those circles been drawn to scales?

A. Yes, sir, they were drawn to scale.

Q. And will they show the locations of the towns like Haines City, Lake Hamilton, and Dundee that have been testified to and about this morning by the witnesses?

A. It does.

Q. Does that, also, show the section, township and range of the property located within Polk County?

A. It does.

Mr. Reeves:

We offer this map in evidence as Defendant's Exhibit No. C.

Mr. Garrett:

No objection.

The Court:

Let it be admitted.

. . . Thereupon, the document last referred to was admitted in evidence and marked Defendant's Exhibit No. C.

Mr. Reeves:

Q. Now, Mr. Huffaker, taking the map here before you, Exhibit No. C, and I notice the by-laws, Defendant's Exhibit No. B, show that the common stock of the corporations issued to and sold and owned only by the owners of bearing citrus groves located within Townships 26 and 27.

South Range 27 east, Polk County. Does that map you have before you show the location of those townships?

A. It does.

Q. Where, for the benefit of the Court, do those townships fall with reference to the circles that you have drawn?

A. Well, the first circle has a diameter of 20 miles, and radius of 10.

Q. Now, for the benefit of the Court, there was testimony this morning about groves at or near Lake Hamilton, does Lake Hamilton fall within 10 or 20 miles from Davenport?

A. The circle will fall in the town of Lake Hamilton as well as the lake itself.

Q. Does that mean the Town of Lake Hamilton is less than your first circle which would be. 10 miles from Davenport?

A. Yes, sir.

Q. Now, there was some testimony about Dundee, is that, also, within 10 miles?

A. Yes, sir.

Q. How about Haines City?

A. It is within the area of 10 miles.

Q. How about Auburndale?

A. Auburndale is in the next belt between the 10 mile radius and the 15.

Q. Now, how about Lake Alfred?

A. Lake Alfred is within the radius.

Q. Which radius?

A. 10 mile radius from Davenport.

Q. How about Lucerne Park?

A. It is within the 10 mile radius.

Q. There was some testimony by one of the men, as I recall it, that some of his fruit came from some grove down dear Hesperides—

A. (Interrupting) It is 7 miles east of Lake Wales and falls beyond the 20 mile radius.

Q. Between the 20 mile radius and the 25 mile radius?

A. Yes, sir.

Q. In other words, it would be less than 25 miles from Davenport?

A. Yes.

Q. There has been some other testimony with reference to Babson Park. Where is that located with reference to Davenport?

A. It is within the 20 mile radius.

Q. 20?

A. No, change that to 25.

Q. There is one other thing I meant to ask you, those two townships that are referred to in the by-laws, 26 and 27 of range 27 East, how far are those from Davenport?

A. The groves do not extent to the top of township 26, but only to Section 19; I believe that is approximately 5½ miles of the city limits to the north, and the other part of the territory is—Davenport is in Section 3 and 10 of 27-27.

Q. I hand you another map or sketch and ask you if you can identify that (handing paper to witness)?

A. This is a copy of a plat of the Holly Hill Fruit Products, Inc., Davenport, Florida, which was the original developer of the something like 4,000 acres of grove in Davenport, in this Township 26 and 27, and this map shows in red the member groves of the Association.

Mr. Garrett:

Q. What association?

The Witness:

A. Holly Hill Fruit Products, Inc.

Mr. Reeves:

Q. Are they all within Township 26 and 27 or Range 27?

A. They are.

Q. I notice they are or seem to be divided into small tracts, according to the legend, five acre tracts?

A. Yes, sir. Possibly, 5,000 acres of land is let out in five acre tracts called the Florida Development Company.

Mr. Reeves:

This map is offered in evidence as Defendant's Exhibit No. D.

Mr. Garrett:

No objection.

. . . Thereupon, the document last referred to was admitted in evidence and marked Defendant's Exhibit No. D.

Mr. Reeves:

Q. Mr. Huffaker, in preparing this case for trial did you attempt to ascertain where every box of fruit was produced that was handled by the defendant during the two seasons '38-'39 and '39-'40?

A. I went to the office frequently and conferred with the executive officers, Secretary and Treasurer and General Manager, and at my request the records were prepared—the statements were prepared based upon the records of the company showing the location of the groves and fruit that came from each particular grove.

Q. This morning there were references made to fruit sold to and delivered to some distributing company, can you explain that?

A. Grapefruit Distributors, Inc., is an ordinary commercial corporation that operates as a non-member of the Association. The Association can do business up to 50 per cent. of its total with outside parties, and this corporation with Headquarters at Davenport purchases outside grape-

fruit for the cannery and shares in patronage dividends like regular members.

Q. So that name that has appeared in the testimony this morning, and if it should appear later in the case, that's the company that they are talking about?

A. That is the Grapefruit Distributors, Inc.; that's the full name.

Q. Mr. Huffaker, in trying to get up information or evidence as to where this fruit came from, did you find that some of the fruit was bought from groves of which you had knowledge? Did you make up a memorandum?

A. I did.

Q. What is that memorandum? What does it have reference to, Mr. Huffaker?

A. Groves owned by the Ervin Estate '38-'39; our records show the purchase of considerable grapefruit from the Ervin Estate with which I have been connected ever since Mr. Ervin's death; ever since his death I have handled all of the legal business of the estate and I know the legal description of all of that property. The records will show that some grapefruit was purchased from Lucerne Park groves, all of which is shown on the map, and considerable grapefruit was purchased from the grapefruit grove at Lake Hamilton—

Q. (Interrupting) Wait a minute, Mr. Huffaker, how far are those from Davenport?

A. They were within the 10 mile radius.

Q. Within the ten mile radius?

A. Yes, sir.

Q. What else is there?

A. I have a heading called the Clay Binion groves and a legal description of it which is quite lengthy.

Q. Did some of the fruit for those two seasons come from that grove or those groves?

A. The fruit shown on the record as purchased from the Clay Binion Estate came from it.

Q. How far, approximately, is that grove from—

A. (Interrupting) That is called the Griffin Grove and is located approximately 4 miles northwest of Lakeland on the road between Lakeland and Cathaline and within the 25 mile radius.

Q. From Davenport?

A. Yes, sir.

Q. None of the distances you have given us, or attempted to place an estimate, are roads of travel other than air travel?

A. That's correct.

Q. As somebody has said this morning, "As the crow flies"?

A. Yes, sir, as the crow flies.

Mr. Reeves:

That's all.

Cross Examination.

By Mr. Garrett:

Q. Just what is the connection between Grapefruit Distributors, Inc. and Holly Hill Fruit Products, Inc.?

A. Legally, none. They are distinct and separate corporations.

Q. Do the same people own both?

A. No.

Q. Do they have the same officers?

A. No.

Q. The same directors?

A. No.

Q. No common directors at all?

A. No common directors.

Q. No common officers?

A. Yes, common officers.

Q. You do have common officers?

A. Yes.

Q. Who?

A. The officers of Grapefruit Distributors are the officers of Holly Hill, Inc.

Q. Who is manager of Holly Hill Fruit Products, Inc.?

A. Harry F. Di Cristini.

Q. Who manages Grapefruit Distributors, Inc.?

A. Di Cristini, also.

Q. And it was in 1938 that you changed over from a profit corporation to a co-operative?

A. That charter will give the date; I don't remember.

Q. Isn't it clear in your mind it was in 1938?

A. Let me see that exhibit? (Counsel handing exhibit to witness.) There was an error in my original testimony as to the date of transfer to a co-operative association; that was in February, 1934. This is the amended articles of incorporation instead of the original articles of incorporation, but, as I remember it, the charter was rewritten with amended articles in it.

Q. But was it rewritten so as to become a co-operative, or was it already a co-operative?

A. The original corporation was merged into a corporation under the Corporate Act of 1931 in 1934.

Q. And was this provision for the ownership of the corporation within these two townships one of the amendments?

A. It was amended in some particulars to enlarge the right of grove owners to acquire stock; the theory wasn't changed, Mr. Garrett.

Q. The theory wasn't changed?

A. No, sir.

Q. What was that theory?

A. Originally it was incorporated as a condition of owning common stock a person must own a lot or grove within this territory, and, I believe, they were limited to one share per lot or two or three shares per acre.

Q. What was the theory of limiting the ownership of stock to parties owning groves in those two townships?

A. To obtain the co-operation of the growers.

Q. In other words, that was a rule of thumb arranged for in the general vicinity of the canning plant—

A. (Interrupting) The canning plant wasn't in operation when this corporation first changed.

Q. It was a rule of thumb arranged to make members neighbors, so to speak? Is that right?

A. It was a corporation organized to save these grove owners in this territory originally bought by people in the north through Holly Hill Fruit Products, Inc. for the convenience and help of those growers in taking care of their groves; a community affair, and share in the profits.

Q. Do you mean by that that the Holly Hill Fruit Products, Inc., or some such subsidiary of Wilson & Toomer, put on a development scheme by which they sold groves in the neighborhood of Davenport, and they needed a canning plant to serve them, and, therefore, this organization of a fruit company and packing plant was organized to serve those particular groves?

A. The Holly Hill Fruit Products, Inc. was for the purpose of handling those groves—there is no separate corporation for the cannery; it is at one end of the packing house and was put in operation for the purpose of salvaging and processing the grapefruit from these groves, but the operation is not limited to the groves. The operation of a co-operative is confined to—it is not confined to the members, and they can do business with outside members up to 50 per cent. of their total produce handled. It was never the idea at all that the cannery was organized exclusively for the benefit of these growers.

Q. That was the primary purpose, in order to get volume and turn over they were willing to do business on a profit basis?

A. In order to run the plan economically, keep the men employed, and serve the grove owners in that vicinity—in the vicinity of that territory, they purchased fruit in dif-

ferent parts of the County in the same way that all of the packing houses were handled in that territory.

Q. And to the extent they purchased this fruit they were not on a co-operative basis with the people they bought the fruit from?

A. Yes, sir, they came in on the same basis. Under the law you can't do any business with an outsider without putting him on the same basis as a member of the Association. If you went down and got some of your fruit and put it into that packing house you would get the same percentage rebate at the end of the season.

Q. And does that account for Mr. Cook and Mr. Weatherford?

A. Grapefruit Distributors is the non-member; possibly, a few of these grove owners could be identified as officials of the company, and dealt directly with us, but Grapefruit Distributors is the—

Q. (Interrupting) You don't claim they were co-operatives?

A. No.

Q. You have prepared some sort of a schedule, a copy of which you have handed me—

A. (Interrupting) I didn't prepare them.

Q. Well, it has been prepared?

A. Yes.

Q. There is a percentage shown of the Holly Hill Groves Cannery Fruit and a percentage of Grapefruit Distributors, Inc. and the two percentages added together make up 100 per cent. of the volume.

A. I can't explain that.

Q. There is no co-operative relation between the Association and Grapefruit Distributors, Inc.?

A. Yes.

Q. What is that?

A. It is a patron of the co-operative.

Q. It goes out and buys from wherever it sees fit and sells or merely puts it through your plant?

A. Sells to the corporation—to Holly Hill Fruit Products, Inc. Holly Hill Fruit Products processes that fruit in its canner.

Q. And gives it the same percentage as every other owner?

A. The same percentage rebate.

Q. The same pools?

A. No, I don't understand all about that pool.

Q. What is the population of Haines City?

A. I don't know.

Q. You don't know?

A. The United States Census shows what the population is, and I refer you to that and the State's, also, Mr. Garrett.

Q. You have practiced law in Bartow for how long?

A. Since 1911.

Q. That is the County seat of Polk County and is 20 miles from Haines City?

A. Yes; 30 from Davenport.

Q. And you don't know approximately what is the population of Haines City?

A. No, I don't know.

Q. In circling these air distances for the fruit that goes to the Holy Hill Fruit Products, Inc., do you know of any that is delivered by air?

Mr. Reeves:

If the Court please, the question is objected to as being immaterial and irrelevant.

Mr. Garrett:

I want to know the difference between air distances and road distances.

Mr. Reeves:

If your Honor please, fruit is not delivered by airplane.

Mr. Garrett:

Then, he can say so.

The Court:

I don't know whether it is or not.

The Witness:

As witness and counsel, may it please the Court, I object to the question. It is an effort to make the witness ridiculous.

The Court:

It is not ridiculous. Is there any fruit delivered by air?

The Witness:

No.

Mr. Garrett:

Q. It all comes by trucks?

A. Absolutely.

Q. You have testified as to distances to the packing plant, did you take that into consideration at all? Your testimony as to distances to the packing plant doesn't take that into consideration at all, does it?

A. No, not according to this map.

Q. And however unfamiliar you may be with Haines City, you do know that Lakeland is how far by road from Davenport?

Mr. Reeves:

That is objected to as immaterial and irrelevant. The interpretation of this is that it is 10 radius miles, and we say it is 10 miles by air, and if the Court wants to go into that question and settle it once and for all, why, we will be delighted to do so.

Mr. Garrett:

We think the Court will not necessarily consider only the theory of counsel for defendant, as there is evidence for our theory as much as Mr. Reeves', and I think we have got a reasonable right to present our theory.

The Court:

Objection overruled.

Mr. Garrett:

Q. How far is Lakeland from Davenport?

A. I don't know exactly, Mr. Garrett; by road any ordinary travel map will show your mileage.

Q. You don't know?

A. I don't; I have traveled it hundreds of times but I have never checked it on my speedometer.

Q. It was over 10 miles, wasn't it?

A. Yes, sir.

Q. Would you say it was over 20 miles?

A. Yes.

Q. Would you say it was over 30 miles?

Mr. Reeves:

Objected to, if the Court please, as not being in cross of anything brought out on direct examination.

The Court:

Objection overruled.

The Witness:

What is the question?

Mr. Garrett:

Q. Would you say it was over 30 miles?

A. No, I wouldn't say it was 30 miles; I don't know.

Q. By road how far is this—

A. (Interrupting) Hesperides?

Q. (Continuing)—Hesperides?

A. It is, possibly, a little over 30 miles.

Q. How far is Lake Wales?

A. Lake Wales is about 25.

Q. How far is Loughman?

A. About 5 or 6 miles; my recollection is that it is only a short drive between the two towns—6, 7 or 8 miles.

Q. How far is Lake Alfred by road?

A. That road is fairly straight, and, I would say, Lake Alfred is just about 10 miles by road.

Q. Only 6 miles south of Haines City?

A. I think so; yes, sir.

Q. How far is Auburndale?

A. Well, Auburndale is about—right around 15 miles; possibly, a few miles more or less.

Q. All of this territory and these questions about these places I have asked you about are in what is known as the citrus producing section of Polk County?

A. They are.

Q. And practically all of them, unless it is Loughman, has one or more packing houses?

A. I believe so; yes, sir.

Q. They have good roads leading to those packing houses from the groves in the vicinity?

A. They do.

Q. In order to get any truck from any place like Dundee or Lake Alfred to Davenport you have to drive to two or three places with packing houses, don't you?

A. What place? Without repeating your question, what are the two towns you mentioned?

Q. Dundee or Lake Alfred.

A. Lake Hamilton and Haines City.

Q. Dundee itself has a packing house?

A. Yes, it has.

Q. And those packing houses in Haines City serve that particular neighborhood, don't they?

A. They do and considerable other territory.

Q. And the packing house at Dundee serves the Dundee neighborhood?

A. Yes, they each serve their own community and crisscross in every direction.

Q. Lake Alfred, is there one there or not?

A. Yes.

Q. They serve Lake Alfred?

A. Lake Alfred and Haines City and any part of the citrus belt in Polk County that is convenient.

Q. And the point you are making is that they compete with each other for the same groves?

A. Not necessarily so.

Q. For the production of the same groves?

A. There is a kind of competition, yes.

Q. And the actual neighborhood, general vicinity, location of the groves at Davenport is in the townships you fixed many years ago for service by this particular packing house?

A. You can't put the answer in my mouth, Mr. Garrett.

Q. Then, I will ask you—

A. (Interrupting). I will not say in the general vicinity; it is up to the Court to find that, and I am not going to argue that with you. If you will ask it right I will try to answer.

Q. Put it any way you want.

A. You want to know if the two townships or range is in the general vicinity of operations of the Holly Hill Fruit Products?

Q. Yes.

A. It is not.

Q. Does it go beyond the general vicinity?

A. It does in its cannery.

Q. It does in its cannery?

A. Yes, sir, it goes beyond that.

Q. You are sufficiently familiar with the Holly Hill Fruit Products Inc. to know whether they operate with more than ten employees, are you not?

Mr. Reeves:

Objected to, if the Court please, as immaterial and irrelevant.

Mr. Garrett:

I don't think it is immaterial; however, it may not be in cross.

The Court:

Objection sustained.

Mr. Garrett:

Q. Do you happen to know the general amount of the population of Davenport?

A. No, I don't know it.

Q. Would you say it is more than 300?

A. I haven't had occasion to investigate and see. You know the Court knows it is quite a small town, and the official publications of Florida and the United States Census shows that.

Q. You wouldn't be prepared to tell me it is more than 300?

A. No.

Q. Do you know whether the people that work in your place come from and live in Davenport or elsewhere?

A. I understand a considerable number of them, and particularly your clients, live in Kissimmee and Loughman and Orange County.

Q. There are not enough employees available in Davenport to operate it?

A. No, sir.

Q. (Indicating exhibit.) You didn't, yourself, draw these circles but you are assuming—

A. (Interrupting.) It was done under my instructions and direction, Mr. Garrett.

Q. And you checked them enough to be fairly well satisfied that they are correct?

A. Yes, sir, it is correct.

Q. And by road distance Haines City is well within the first 10 miles radius?

A. Yes.

Q. And by road distance Lake Hamilton is just about 10 miles?

A. Yes.

Q. That is a little community? All of this?

A. Small town.

Q. Dundee by road is about 10 miles from Davenport?

A. I believe a witness this morning fixed the distance at about 10 miles.

[Q.] A. And you have no criticism about how they fixed it?

A. No.

Q. And Lake Alfred should be, according to you, 10 miles?

A. About that; maybe a little more, maybe less.

Q. That is an incorporated town?

A. That's a fairly straight road.

Q. I say it is an incorporated town and quite a sizable community, isn't it?

A. Yes, it has some size.

Q. The thorough-fares, and roads, and highways in this locality here don't converge on any one particular one of those towns, do they?

A. No, Polk County has the best developed road system in the State of Florida, and they are built with the intention of contributing to the different communities.

Q. As a matter of fact, you don't know of any good

roads running out of, or around, or thrugh Davenport except the main highway Route 17, do you?

A. Oh, there are several such roads and bridges in that community.

Q. Are they paved?

A. Yes, sir.

Q. In what community do you mean?

A. Davenport.

Q. What general limitation or genera do you put around that word "community"?

A. I think—

Q. (Interrupting.) You wouldn't include Haines City, would you?

A. Yes, sir.

Q. As part of Davenport?

A. Yes, sir.

Q. Lake Alfred is for the purposes of handling fruit economically and satisfactorily and in accordance with the law?

A. Yes.

Q. And for the purposes of entertainment?

A. It is very convenient; you can go to a picture show there in a few minutes.

Q. Does Davenport have a picture show?

A. I am not sure.

Q. It is a complete community with a drug store and other things?

A. It has a piece of a drug store.

Q. Is it incorporated?

A. Yes, sir, I incorporated it.

Q. It is well incorporated?

A. Yes, sir, it is fixed right.

Q. When this amendment was made to the charter of Holly Hill Fruit Products, Inc., was that the time Mr. Di Cristini took over?

A. He has been with the company since 1929 but not the general manager. He was there as sales manager when Mr. Christ was general manager and upon his death Mr. Di Cristini succeeded him.

Q. This red on the map indicates a great many pages or red all of which are groves?

A. Yes, sir.

Q. It, also, shows a lot of white, that is, also, groves?

A. There are, probably, twice as many groves indicates in red.

Q. What happens to the produce from those groves?

A. Well, the cannery handled a large part of the grapefruit.

Q. Does the cannery only handle grapefruit?

A. Only grapefruit except cannery juiced oranges. We don't process any oranges by packing—

Q. (Interrupting.) Show me, if you will, how those townships divide up? On this one?

A. (Indicating.)

Q. Lake Hamilton is outside the two townships?

A. Yes, sir, Lake Hamilton, Township 28.

Q. And Dundee is outside the two Townships?

A. It is.

Q. And Lake Alfred is outside the two Townships?

A. It is.

Q. What is the reason for the stopping of the groves of the owner-co-operative owners of the Holly Hill Fruit Products, Inc. at this point north of Section 19 and at the point beginning with Section 20 of that top Township? Is that the end of the development?

A. That happened to be the extent of the development of that part of the County in groves by Holly Hill Fruit Products, Inc., and it wasn't intended to limit the benefits of the corporation, and if it had been 10 or 15 miles away the construction would have been made the same way;

so far as the co-operative is concerned, it is a family affair that the owners took pride in.

Q. You are using the word "family" in a generalized sense? You don't mean that they are related do you?

A. Not at all.

Q. You mean related in affairs?

A. They are all friendly in that sense; they call themselves a big family group of Holly Hill owners.

Q. Is this Holly Hill Fruit Products, Inc. operating a packing plant, too?

A. The packing house consists of packing house machinery on one end and with all machinery for the operations and processing of fruits for fresh marketing, and half of the north end is a cannery.

Q. Is the cannery owned by this corporation?

A. By the same corporation; owned and operated by Holly Hill, Inc.

Q. There is no distinction in departments? It is one, solid corporation?

A. No separate entity.

Q. They simply used the cannery at one end?

A. Yes.

Q. And the same limitations as to ownership and territory abide with reference to the packing company as with reference to the Cannery?

A. There is no separate relationship or existence of the cannery from the packing house; they are one single unit.

Q. And the owners who use your packing house are limited to the same two townships as the owners who sell fruit to the cannery?

A. There is no limitation; there is no limitation on the operation of Holly Hill, Inc. I don't believe you understand the principle of a co-operative Association. This Association can do business with or up to 50 per cent. of its total capactiy, but those people can't own stock in the corporation. The ownership of stock is limited to people

who have been bearing citrus groves and are patrons of the company, and that is the theory of the co-operative system.

Mr. Garrett:
That's all.

(Witness excused.)

129 WILLIAM P. HICKMAN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Reeves:

Q. State your name for the record, please, sir.

A. William P. Hickman.

Q. What official position do you hold, if any, with the defendant, Holly Hill Fruit Products, Inc.?

A. I am Treasurer and Chief Accountant.

Q. How long have you been with that company?

A. Since June, 1932.

Q. Did you, at the request of counsel for the company, attempt to get up all of the information available as to where the fruit used by the cannery in the seasons '38-'39 and '39-'40 was produced?

A. Yes, sir.

Q. What did you do in accumulating that data, Mr. Hickman? How did you go about it?

A. We got the records of the company, and, particularly the Grapefruit Distributors, and attempted to run down each one of the names that appeared on the books as people from whom we had purchased fruit; we attempted to find them, and we sent out questionnaires telling them

what we wanted. We wanted to know where the fruit came from—what grove the fruit came from that they sold to us, and we asked them to send back this information on the questionnaire that we sent out.

Q. I hand you a mimeographed paper (handing paper to witness). Is this one of the mimeographed copies that you used in trying to get this information?

A. Yes, sir.

Q. The rest are just like that (indicating) except they have the name of the party to whom they were sent and the description of the fruit?

A. Yes, sir.

Mr. Reeves:

We offer the paper in evidence as a sample of the copy.

Mr. Garrett:

No objection.

The Court:

Let it be admitted.

. . . . Thereupon, the document last referred to was admitted in evidence and marked Defendant's Exhibit No. E.

Mr. Reeves:

Q. In addition to sending out those questionnaires, what, if anything, did you do?

A. Some of them did not come back and Colonel Huffaker went to some towns and I went to some towns and tried to find them. I talked to some of them and they told me about where the fruit came from—some of them that testified here today.

Q. Let us start off this way, Mr. Hickman. I understand from the testimony that a cannery is operated by the defendant, Holly Hill Fruit Products, Inc.?

A. Yes, sir.

Q. The same as the fresh fruit end of the business? Is that correct?

A. Yes, sir.

Q. This suit is on behalf of certain people who claim they are entitled to money under the Wage & Hour Law. Have you checked to determine whether those people are or claim to have been employees of the cannery?

A. Yes, sir, they are all employees of the cannery.

Q. With reference to the cannery, do you have or did you have at that time complete records as to where fruit was produced when the fruit was received by the company?

A. No, at the time the fruit came in, we didn't have any record.

Q. So that in preparing for this case it was impossible for you to go to your records and determine where fruit came from?

A. That's correct.

Q. As I understand it, you sent out these questionnaires and interviewed the people. Did anybody else in the organization help you in doing that?

A. Mr. Di Cristini called some and Colonel Huffaker called some, and I went out and tried to find some.

Q. At our request did you get up a statement showing the total number of boxes of fruit used by the cannery during the two seasons involved in this case? (handing paper to witness).

A. Yes, sir.

Mr. Reeves:

We offer in evidence the paper just identified by the witness, a copy of which we have furnished to counsel.

Mr. Garrett:

As evidence of what they did, I have no objection, but as to whether it is true or not depends on the sources of

information which he has already indicated were of the vaguest kind.

The Court:

Is this a statement of the number of boxes actually used?

Mr. Reeves:

There is a lot of information on it, your Honor.

The Court:

All right.

. . . . Thereupon, the document last referred to was admitted in evidence and marked Defendant's Exhibit No. F.

Mr. Reeves:

Q. In connection with that, did you, also, Mr. Hickman, get up a statement for each of the seasons involved showing, to the best of your information and belief, where said fruit came from?

A. Yes, sir. (Handing papers to counsel.)

Q. And are those two papers which you now hand me the ones you prepared or had prepared under your supervision?

A. Yes, sir.

Mr. Reeves:

We offer in evidence those two papers and ask that they be marked Defendant's Exhibits Nos. G and H.

Mr. Garrett:

Q. I assume the sources of your information are those which you have already told counsel?

A. Partly records and partly the sources of information that I have mentioned.

Mr. Garrett:

We interpose the same objection; we can't accept those as representing the truth. We think they should be filed without question, but how much weight we will give them will depend on how well authenticated they are.

The Court:

All right, admitted for that purpose.

. . . . Thereupon, the documents last referred to were admitted in evidence and marked Defendant's Exhibits Nos. G and H.

. . . . Thereupon, a discussion was had off the record.

Mr. Reeves:

Q. Now, Mr. Hickman, let us get one or two things straight. Let's talk about your Exhibit No. F, which is the compilation. You have got a column headed "Boxes 1938-1939 Season", and then on the left you have the total, combined volume, packing house and cannery, 702,160. As I understand it, that means the total number of boxes used in the cannery and packing house that year?

A. That's correct.

Q. And you have under that deducted fresh fruit packing house volume, 383,618. As I understand it, you deducted from that what went through the fresh fruit part of it so that you have left, to-wit: 318,542, and that represents the number of boxes that went through the cannery that year, isn't that correct?

A. That's correct.

Q. You have following that, under that, Holly Hill Groves Cannery Fruit, 258,857, does that mean that that fruit all came from the grove marked in red on Exhibit No. D?

A. That's all the fruit that came through on pools; we might have handled others as Colonel Huffaker pointed

out. These are our member groves; they are people that own stock. We might handle your grove but if you didn't own stock, and, as said, it wouldn't necessarily be on there.

Q. Have you brought here today your original records as to the fruit that went into those pools?

A. Yes, sir.

Q. That is on the tables and is rather voluminous (indicating)?

A. Yes, sir.

Mr. Reeves:

It is subject to counsel's inspection if they want to see it.

Mr. Garrett:

All right, unless we decide after cross examination.

The Court:

What is this (indicating)?

A. That means all of the fruit handled through the Holly Hill pools that wasn't purchased by Grapefruit Distributors.

The Court:

It is not confined to the members?

A. Not necessarily; no.

Mr. Reeves:

Q. Now, following that you have an item Grapefruit Distributors, Inc., purchases, 59,685. As I understand it, what you did is you took all of the fruit that went in the canning plant and you divided that two ways. First, all that went through pools, and, second, all that came from Grapefruit Distributors, Inc. Is that correct?

A. Correct.

Q. Let's take Grapefruit Distributors, Inc. for that year —it shows 59,685. That's the total number of boxes that came from Grapefruit Distributors that year?

A. Yes, sir.

Q. Now, as I understand it, you have an analysis of the fruit that came from Grapefruit Distributors. That's correct?

A. Yes, sir.

Q. Now, under the column headed "Boxes 1938-1939 Season" you have certain figures, and over to the left you have "within 10 miles", 15, 20, 25, over 25 and unknown. Have you placed here the figures as to the total number of boxes that fall into all of those categories according to your investigation and your best knowledge and belief?

A. Yes, sir, according to that map that Colonel Huffaker had.

Q. Now, one other figure we ought to explain here—total dumps and rots and so forth—633, what does that mean?

A. Grapefruit Distributors bought this fruit and Holly Hill credited it on its pool, and in the meantime 633 boxes in the canning process rotted and Grapefruit Distributors, Inc. didn't get credit for this 633 boxes.

Q. Let us leave that a minute and take up Exhibit No. H, which is the 1938-1939 season. As I understand it working this with Exhibit No. F you show a breakdown of those figures contained in the analysis part of the statement just referred to, don't you?

A. Yes, sir.

Q. Now, you have some dates on the left hand column, what are those dates?

A. That is the date of our check.

Q. Does that necessarily mean you bought the fruit that day? On that date?

A. No, sir, that is the day we made our check and gave it to him.

Q. The next column is headed "Name". Is that the name of the purchaser or the owner of the grove or what?

A. That's the party that got the money.

Q. Then, you have the number of boxes. That is the number of boxes including that check?

A. Yes, sir.

Q. Then, you have location of groves. Have you shown the location of those groves where you knew them and where you could find out where they were through the methods you have testified about by sending out a questionnaire, making an investigation, talking with other people in the organization?

A. Yes, sir.

Q. Some of those are blank. Does that mean you were unable to definitely locate the groves from which that fruit came?

A. Yes, sir.

Q. In those instances where you could not definitely locate the groves where did you show that fruit in reference to the number of miles from the canning plant?

A. There is a column that says "distance unknown" and we put those boxes in there.

Q. To the far right?

A. To the far right.

Q. Next is the variety of citrus purchased, which speaks for itself, and then you have columns "within 10 miles", 15 miles and so forth. Under that you put the number of boxes that came from different groves at that distance, as I understand it?

A. Yes, sir.

Q. Where, for intance, you have 20 miles, does that mean, Mr. Hickman, that you estimated that as road miles or under the radius shown on the map introduced in evidence?

A. We used this map and used those circles.

Q. That doesn't mean the road miles?

A. No, sir.

Q. You didn't attempt to do that?

A. No, sir.

Q. Now, with reference to Defendant's Exhibit No. G. This I understand is the same as we have just covered except it is for the 1939-1940 season?

A. Yes, sir.

Q. After you had accumulated this information 1938-1939, Exhibit No. F, did you, likewise, by the same information compute this for the season 1939-1940?

A. Yes, sir.

Q. I notice you have by each season a column headed per cent 1938-1939 season and some figures under that. Where did you get those from?

A. Well, we used the total volume that went through the canning plant as 100 per cent. and then we applied 318,542 to the other figures to find out the percentage that went through the canning plant—81.26 per cent. and the grapefruit brought in there 18.74, and down at the bottom we further broke down that 18.74 into the various percentages within 10. 15, 20, 25 and so on, and that was done for both years, I think, on the same basis.

Q. What percentage of the Grapefruit Distributors' fruit was produced within 10 miles of the packing plant or canning plant during the season 1938-1939?

A. 15.98 per cent.

Q. Have you figured the percentage of fruit used by the cannery during the 1938-1939 season that was produced within a distance of 10 miles from the plant?

A. Yes, sir.

Q. How much was that?

A. 97.24.

Q. In other words, 97.24 per cent of the fruit used in the cannery that year came from within 10 miles?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Now, you don't have set out on this report, as I understand it, the per cent. of the total fruit that was obtained within 15 miles?

A. Yes, there is the total fruit obtain within 15 miles right here (indicating).

Q. But you don't have that figure in per cent., do you?

A. Yes, sir, .46 per cent was the per cent. based on the total volume of the canning.

Q. What percent. of the fruit used in the canning plant during the season '38-'39 was produced more than 10 miles from the and less than 15 miles?

A. .46 per cent.

Q. What per cent. of the fruit used in the canning plant for the season 1938-1939 was produced more than 15 miles from the plant and less than 20 miles?

A. None.

Q. What per cent. of the fruit used by the canning plant in the season 1938-1939 was produced more than 20 miles and not less than 25 miles from the plant?

A. 1.53 per cent.

Q. What per cent. of the fruit used by the canning plant during the 1938-1939 season was produced over 25 miles from the plant?

A. None.

Q. You have heretofore testified about some of the fruit that came from groves and that you did not know where they were located. In other words, you did not know which groves they were, and you have testified that you carried those out as "unknown". What per cent. of the fruit used by the cannery during 1938-1939 season came from groves of which you have not obtained sufficient information to put them into any category?

A. .96 per cent.

. . . . Thereupon, a discussion was had off the record.

Mr. Reeves:

Q. Mr. Hickman, you show here a total of 258,857 boxes or 81.26 per cent. of the fruit used in 1938-1939 season under the heading Holly Hill Groves Cannery Fruit, do you know from what distance that fruit was obtained?

A. Within 10 miles.

Q. Within 10 miles?

A. Yes, sir.

Q. You have testified, I believe, that .96 per cent. of the fruit you were unable to find out where it came from?

A. Yes, sir, I did.

Q. Do you have any reason to believe that that fruit came from over 25 miles or less than 25 miles?

A. We couldn't find the people, and I don't know.

Q. You just don't know?

A. No.

Q. If this same percentage holds true—in other words, if 97.24 per cent. of all the fruit you could find came from within 10 miles, and that same per cent. held good for the stuff you don't know about, there is only a very small part of that item that would fall over 10 miles?

A. Yes, sir.

Q. For the season 1939-1940 what percentage of the fruit used by the cannery came from within 10 miles?

A. 91.39 per cent.

Q. What per cent. within 15?

A. .69 per cent.

Q. What per cent. within 20 miles?

A. None.

Q. 25?

A. 3.09 per cent.

Q. What per cent. within or over 25 miles? Over 25 miles?

A. None.

Q. And what per cent. came from groves that you were unable to locate?

A. 4.86 per cent.

Q. It, also, shows for that season 70.91 per cent. Holly Hill Groves Cannery Fruit. Do you know what distance that fruit came from?

A. It is pool fruit within 10 miles.

Q. It has been testified in this case that these groves marked in red on Defendant's Exhibit No. D are groves of members, is that correct?

A. Yes, sir.

Q. Likewise, I believe Mr. Huffaker pointed out that there were many other groves in that section?

A. Yes, sir.

Q. Does the cannery get fruit from those other groves?

A. Yes, sir.

Q. When you talk about this Holly Hill Cannery Fruit coming from within 10 miles, it is possible it came from around those particular groves there (indicating)?

A. Yes, sir, we have less than half of the groves there; that is why we call them Holly Hill Groves—they have—that's what they are generally known by.

Q. Mr. Hickman, does the Holly Hill Fruit Products, Inc., own trucks or do its own hauling?

A. It owns 12 or 13 trucks. Yes, sir.

Q. Do you know the number of acres that are shown in red on Defendant's Exhibit No. D or approximately the number?

A. I have it in an audit report—between 2,300 and 2,400 acres.

Q. You can look it up later and if you are in error you can let us know.

A. Yes, sir.

Q. The fruit that is hauled by the defendant, is that fruit bought outright, or is that fruit received from members, or fruit put in the pool, or what is that?

A. As a general rule the Holly Hill company trucks hauls the members fruit, and any of these outside people we have been talking about their fruit is hauled by so-called bird dogs, or the grower themselves.

Your records show where you mailed the checks to these people shown on Exhibits G and H?

A. Yes, sir, it does.

Q. Does that necessarily mean that those groves were there at all?

A. Not in my opinion.

Q. As a matter of fact, a man might live in the north and own a grove down here and you send him a check up in the north?

A. Yes, sir.

Q. So far as the records are concerned, the fact that it shows where you mailed the check to that doesn't mean where the grove was?

A. No, sir.

Q. In order for you to determine the location of those groves you had to talk with the people from whom you obtained the fruit, and to the members of your organization, and make inquiries and investigations, and this is the result—what you have here today?

A. Yes, sir.

Q. In your opinion, Mr. Hickman, is that true and correct?

A. Yes, sir.

Q. How far is your plant from the groves, Mr. Hickman?

A. From the groves?

Q. From any groves?

A. There are groves within a block of it; town lots.

Q. Very many groves, or just one?

A. You know the town at one time was all grove, some have been neglected and abandoned, but there are 50 or 60 acres in the town limits that we take care of.

Q. Is the plant within the town limits?

A. Yes, sir.

Q. As a matter of fact, there are many groves right around the plant? Groves on every side?

A. Yes, sir.

Q. It is a fact, is it not, that fruit is grown commercially all around your plant?

A. Absolutely.

Q. You are right in the area where fruit is produced commercially?

A. Right in the middle of that development.

Q. As I understand it, that is in Polk County?

A. Yes, sir.

Q. It is one of the largest citrus producing counties in the State?

A. I understand it produced the bulk of the fruit.

Mr. Reeves:

That's all.

The Court:

We will take a few minutes recess.

(After recess.)

. . . . Thereupon, the witness, William P. Hickman, resumed the stand for further direct examination.

By Mr. Reeves:

Q. Mr. Hickman, I asked you about how many groves were shown in red on Defendant's Exhibit No. B, and you told me, according to your information, you had those figures. Have you checked those figures?

A. At the end of June 30th, 1939, 1,997.48 acres, and June 30th, 1938, 1,968.75 acres.

Q. One other thing, Mr. Hickman, I hand you herewith a Standard Oil Company Road Map (handing paper to witness), Florida, 1935, and I ask you has that been circled similar to that other map?

A. According to the scale of the map.

Q. To what extent was that circled?

A. Radius within 10 miles, 15 miles, 20 miles, 25 miles, and, I think, this was 50 miles; that's the extent of it.

Mr. Reeves:
We offer the map in evidence.

Mr. Garrett:
No objection.

The Court:
Let it be marked.

. . . . Thereupon, the document last referred to was admitted in evidence and marked Defendant's Exhibit No. I.

Mr. Reeves:
That's all.

Cross Examination.

By Mr. Garrett:

Q. You are the Treasurer of Grapefruits Distributors, Inc.?

A. Yes, sir.

Q. And Mr. Di Cristini is the Manager?

A. He is the President of Grapefruit Distributors.

Q. And you are the Treasurer of Holly Hill Fruit Products Inc.?

A. Yes, sir.

Q. And he is the President of that?

A. No, he is Vice President and General Manager.

Q. They operate in conjunction with each other, do they?

A. No, they are separate corporations.

Q. Does Grapefruit Distributors, Inc. sell any fruit to anybody but Holly Hill Fruit Products, Inc.?

A. They have; they used to export fruit to Britain.

Q. I am talking about this period we are interested in?

A. To the best of my knowledge, they sold only to Holly Hill Fruit Products.

Q. What is that? A stock company—Grapefruit Distributors, Inc.?

A. Grapefruit Distributors, Inc., I believe, is a Florida Corporation.

Q. A stock company for profit?

A. Yes, sir.

Q. Do you happen to know the stockholders?

A. Yes, sir.

Q. Who are they?

A. Mr. Di Cristini, myself and Miss Howe.

Q. Who is she?

A. She is Secretary.

Q. And the profit that company makes is distributed between the three of you?

A. Well, it is held in the corporation's treasury according to the Board of Directors of that corporation—

Q. (Interrupting.) And the three of you are the Board?

A. (Continuing.) —if they should decide to distribute it that way.

Q. There is no limitation of 8 per cent. on their profit?

A. So far as I know, no limitation.

Q. What position does Miss Howe have with the Holly Hill Fruit Products, Inc.?

A. She is Secretary.

Q. She owns stock in it?

A. I believe she does.

Q. Do you?

A. Yes, sir.

Q. And Mr. Di Cristini?

A. Yes, sir.

Q. Do all of you own groves?

A. They own bearing groves, and I have got a promise of a grove.

Q. And all within the two townships?

A. Yes, sir.

Q. All of those members of the Holly Hill Fruit Products, Inc. are supposed to profit alike and fare alike, is that right?

A. The profits of Holly Hill, Inc. are divided according to the boxes of contribution of the members. Yes, sir.

Q. And this is a little side issue of you three officers?

A. Well, we are the company.

Q. And you have all three been such officers since January 1st, 1938?

A. I am trying to remember; I would like to look that up. I don't remember when I became an officer.

Q. About that?

A. Well—

Q. (Interrupting.) You can check and see and put it in the record when you find out.

A. All right.

Q. The three of you are the directors of it?

A. Yes, sir.

Q. And it has been going on since when?

A. Well, it has been going on since I came to the Holly Hill Fruit Products, Inc. in 1932; it was operated before that time.

Q. What is its purpose? To help furnish volume for Holly Hill Fruit Products, Inc.?

A. The purpose of Grapefruit Distributors was originally to export fruit, and, as you know, the export market isn't very active now. During these seasons you are speak-

ing about it was used to keep the cannery in operation in order to enable us to obtain sufficient volume of fruit to keep the cannery going and fill our commitments.

Q. But it furnished the money of itself for the fruit that was bought?

A. Yes, sir.

Q. It didn't come from Holly Hill Fruit Products, Inc.?

A. Yes, sir.

Q. It bought on its own account and sold on its own account?

A. Yes, sir.

Q. And it sold only to Holly Hill Fruit Products, Inc.?

A. It bought and sold from these individuals you have been examining and put its fruit in the pool, in the Holly Hill, Inc. pool, and got exactly the same price as the patrons, and participated on the same basis as the rest of the patrons.

Q. You were asked if these parties-plaintiff included those that are listed as represented by the three parties were checked over by you on the books and found to be employees of the cannery.

A. Yes, sir.

Q. You found that to be such?

A. Yes, sir.

Q. During those two seasons?

A. Yes, sir.

Q. When I am referring to the cannery, I mean Holly Hill Fruit Products, Inc's. cannery.

A. I guess you do.

Q. Well, do you mean that?

A. Yes, sir.

Q. And since there are some 192 or more of these plaintiffs, the cannery in each of its seasons employed more than seven or over ten employees?

Mr. Reeves:
Objected to as immaterial and irrelevant.

The Court:
Objection overruled; we will have it in the record.

The Witness:
They had how many?

Mr. Garrett:
Q. Over seven or over ten in their employ?
A. Yes, sir.
Q. About how many did they have each year?

Mr. Reeves:
Same objection. Objected to as immaterial and irrelevant.

The Court:
Objection overruled.

The Witness:
I don't know definitely the total volume of the whole packing house, but it will run between three and four and it has run as high as 500 people, but this season—
Q. You would say over 100 for each season?
A. Yes, sir, I would.

Mr. Reeves:
The same objection to the last question, and we move to strike the answer on the same grounds. Objected to as immaterial and irrelevant.

The Court:
Motion denied.

Mr. Garrett:

Q. I am not trying to confuse you, Mr. Hickman, but you did not tell Mr. Reeves that Grapefruit Distributors, Inc. did not go through the pool, did you? As a matter of fact, it did not go through the pool?

A. It did, yes, sir.

The Court:

For canning purposes, too?

The Witness:

Holly Hill, Inc. doesn't buy any fruit; it delivers it on a pool basis. Grapefruit Distributors obtained fruit, put it in the pool, and shares in the same manner as every other participating patron.

The Court:

Do you take it for canning?

The Witness:

Grapefruit Distributors don't buy fruit other than for canning.

Mr. Garrett:

Q. It didn't buy any except for grapefruit?

A. I think Colonel Huffaker testified that way; I think they bought both oranges and grapefruit.

Q. Do they can both?

A. Yes, sir.

Q. At that place?

A. I believe we have canned a small amount of oranges sections, but the volume is grapefruit sections.

Q. What is this canned fruit? Is it juice or segments?

A. It is both.

Q. Do you make grapefruit juice in cans and grapefruit cut into sections?

A. We have two departments—a sectionizing department which makes segments, and a juice department, orange juice and grapefruit juice and combinations.

Q. Are you familiar with the operations of the canning plant?

A. Fairly so.

Q. Just explain the operations for us so that we will get it clearer in the record. After the fruit comes to the cannery the first thing that is done is to unload it?

A. Yes, sir.

Q. Is it next sized?

A. Yes, sir.

Q. Next graded?

A. Well, it might be graded before it is sized.

Q. Either one or the other?

A. Yes, sir.

Q. Is it steamed in order to peel it?

A. The sectionized fruit is the juiced fruit, isn't it?

Q. Sectionized fruit is the only one that is peeled?

A. Yes, sir.

Q. Otherwise, you squeeze the fruit and get the juice out?

A. It is a machine operation.

Q. But as to sectionized fruit—after it is peeled it is sectionized?

A. Yes, sir, peeled by the peelers and then it goes to the lye peeling machine.

Q. They cut it into segments to be used in the cans?

A. Yes, sir.

Q. They cut it into segments to be used in the cans?

A. Yes, sir.

Q. And then it is canned, is that right?

A. That's right.

Q. Then, in the canning do you add a preservative?

A. There is sugar added.

Q. Is there any cooking?

A. After the can is closed.

Q. Then, you put them in the can and cap the can?

A. The can is closed and then it goes to a long steam cooker.

Q. The sectionizer puts them in the can?

A. Puts the segments in the cans.

Q. And then it goes to a can closing machine which caps it?

A. Yes, sir.

Q. And then it is steamed?

A. Yes, sir.

Q. And in between there there is some sugar put in?

A. I don't remember whether we put the sugar in before or after. I don't know whether it is before or after, but anyway it gets in.

Q. Is it then steamed after that?

A. Yes, sir.

Q. And then it is sent out when an order comes in?

A. Yes, sir.

Q. That's the process, isn't it?

A. Yes, sir.

Q. What did you say about the juice? Does it have a preservative or sugar?

A. I have never heard of a preservative; some of it is unsweetened.

Q. Now, you have referred continually in your direct testimony to distances. Those are all air distances on the basis of these concentric circles on the map?

A. Yes, sir, we made no effort to figure road distances.

Q. All of your fruit comes to you by road?

A. Yes, sir.

Q. Practically all of it is hauled there in trucks?

A. Yes, sir.

Q. What was this you were telling Mr. Reeves about? That you had about 14 trucks of your own?

A. I think that's how many we have now.

Q. And you use them for what?

A. Hauling fruit to the packing house, taking fertilizer to the groves, and spraying.

Q. What fruit do you haul to the cannery in trucks?

A. The fruit from member groves in the Holly Hill Corporation.

Q. You don't have anything to do with the hauling of Grapefruit Distributors, Inc's. fruit?

A. We may in an isolated instance, but as a general rule it is handled by outside helpers.

Q. In that isolated instance do you charge up the cost of that truck to Grapefruit Distributors, Inc.?

A. We did; it might be done once or twice, but it is practically never done.

Q. Did you say that the fruit that comes from Grapefruit Distributors, Inc.'s source is brought in there in the trucks of Grapefruit Distributors, Inc.?

A. No, Grapefruit Distributors, Inc. doesn't own any trucks.

Q. How does it get there?

A. These bird dogs.

Q. Do you mean like B. C. Cook?

A. Yes, sir.

Q. By that you mean they smell out a bargain?

A. Yes, sir, I guess so.

Q. They buy cannery fruit and bring it to you and sell it to Grapefruit Distributors, Inc.?

A. That's correct.

Q. Do you tell them what you will pay for it before they go out and buy it?

A. You will have to ask Mr. Di Cristini; about all I know is what we pay for it.

Q. You have been quite frank in stating that in order to answer these questions that counsel for defendant has asked you with reference to the location of groves, that you have had to get every manner and source of informa-

tion you could, and it is not, of course, first hand knowledge. Is that correct?

A. Yes, sir, I know some of the groves and some of them I don't.

Q. Nevertheless, basing it on knowledge you got from hither and yon, you made up these percentages?

A. Yes, sir.

Q. And if that knowledge is faulty then the percentages are false, is that correct?

A. That would be so.

Q. And the witness, Mr. Weatherford, he is listed time after time after time—John Weatherford, 292, John Weatherford, 133, John Weatherford, 557, John Weatherford, 277, John Weatherford, 82, John Weatherford, 622, and so forth. When you put the location of his grove and undertake to determine within 10 miles—you have to depend on him to tell you where you got that fruit?

A. He told Mr. Di Cristini that all grapefruit came from one place and the oranges from another.

Q. You heard him testify this morning, did you not?

A. I don't remember exactly what he said.

Q. Do you remember that he didn't know where he got it from?

A. These figures were made up before these people testified and we had to put them down.

Q. I am not criticizing your honesty, I am asking you if you relied on John Weatherford to tell you?

A. Yes, sir.

Q. And when he says he don't know, you don't know?

A. I put it down like he said.

Q. You don't know any more than what he told you?

A. I don't know as much.

Q. And that's also true about Cook—Cook, 4,383, Cook, 418, Cook, 324? You remember Mr. B. C. Cook unfortunately lost his records and he couldn't tell you where they came from, but he did make a guess within some radius, and that's all you can rely—

Mr. Reeves: (Interrupting):

Objected to as being an erroneous statement of the testimony of the witness.

The Court:

The record, of course, will show.

Mr. Garrett:

Q. Didn't you have to rely on Mr. Cook for your information?

A. Not entirely in the case of Cook because I know where he lives, and I see his trucks in the groves all of the time. We did rely on his information; he told us where the fruit came from, but we, also, have seen him picking fruit.

Q. But you don't remember about any particular season? '38-'39 or '39-'40?

A. No, I don't.

Q. You had to rely on him?

A. Yes, sir.

Q. There is a considerable portion of this fruit that comes from those two sources alone—Weatherford and Cook, isn't there?

A. Yes, sir.

Q. And it would upset those percentages considerably if we had to upset them with reference to those two people, would't it?

A. I would have to work that out.

Q. Now, then, throughout your discussion with Mr. Reeves as to percentages, you have been dealing with the proposition of percentages of all of the fruit handled by the cannery, is that correct?

A. All fruit handled by the cannery.

Q. And actually if we look at this exhibit you furnished, and we assume these figures to be correct (counsel referring to Defendant's Exhibit No. F), we find that 81

per cent. came from the member groves and 18 per cent., I am talking about the season of '38-'39,—almost 19 per cent. came from Grapefruit Distributors, Inc.

A. Right.

Q. If you applied your percentages not to the entire 100 per cent. but the amount received from Grapefruit Distributors there would be a tremendous difference, wouldn't there?

A. Yes, sir, but we are talking about the whole cannery.

Q. On the 100 per cent. basis of the whole cannery?

A. Yes, sir.

Q. And, therefore, these small per cents. for distances would be much larger per cents. of Grapefruit Distributors, Inc.—

A. (Interrupting.) Obviously.

Q. (Continuing.) —because practically all of your member groves are within the neighborhood or general vicinity or immediate locality of your cannery, is that correct?

A. Within ten miles, yes, sir.

Q. Talking always about air miles?

A. Yes, sir.

Q. What benefit, if any, did the members of your Holly Hill Fruit Products, Inc., get from the operation of Grapefruit Distributors, Inc.?

Mr. Reeves:

Objected to as being wholly immaterial and irrelevant.

Mr. Garrett:

I think it is early to determine that. When we come to discuss what the proper definition is of area of production we will have to consider whether or not this is entirely co-operative or whether or not it is purely speculative and a profit business, but I think I have a right to

determine whether this is a part of their co-operative service—this Grapefruit Distributors, Inc., or whether it is private speculation.

Mr. Reeves:

If your Honor please, he filed suit on behalf of people as employees of a co-operative, and if the co-operative obtained fruit from somebody else, a separate and distinct corporation, it doesn't make any difference what these people did—whether they are entitled to have the Wage and Hour Law apply to them or not. I can't conceive of any theory being advanced by Mr. Garrett that it makes any difference—it wouldn't make any difference whether the employer was independent or a co-operative; that isn't part of the definition at all.

. . . . Thereupon, a discussion was had off the record.

The Court:

I think we ought to get the testimony in the record, and you can make a motion to strike it out later. Objection overruled at this time.

The Witness:

What is the question.

The Court:

Read the question.

(Question read.)

The Witness:

For one thing, they were enabled to get a larger volume of fruit and to cut down the cost—the cost of packing, and the cost of canning, and the stockholders of Holly Hill, Inc. benefit by the operation of Grapefruit Distributors be-

cause it enabled the company to operate, to get fruit at the time it was needed and to fill its commitments with its customers which would have been canceled and lost if they hadn't been able to get that fruit.

Q. One of the things was it enabled them to reduce the costs of operation?

A. Yes, sir, by volume operation; if you couldn't have gotten your number of days of operation—your number of working days would be cut down by that amount.

Q. What is the percentage involved in the total cost of operations in the payment of wages?

A. I couldn't answer that right off.

Q. Do you hire the help from day to day?

A. I guess you would call it day to day.

Q. If you are not running you are not paying them?

A. Yes, sir.

Q. Does Holly Hill Fruit Products, Inc. furnish money to Grapefruit Distributors, Inc. to purchase fruit?

Mr. Reeves:

Same objection.

The Court:

He has answered that.

The Witness:

He asked me once did Grapefruit Distributors use its own money. It has capital. Yes.

Mr. Garrett:

Q. You have answered that question that it doesn't furnish money to them, is that correct?

A. Holly Hill, Inc. has loaned money, but they have money of their own.

Q. It finances the Grapefruit Distributors, Inc.?

A. Not necessarily; no, sir. It has loaned them money.

Q. It does that constantly?

A. Yes, I guess it does.

Q. That is the money that is used to buy fruit with?

A. Partly that.

Q. Does Grapefruit Distributors, Inc. use any money other than what it borrows from Holly Hill Fruit Products, Inc.?

A. Yes, they have money of their own.

Q. That they borrow from somewhere else?

A. It belongs to them.

Q. How much fruit is from non-stockholders in your figure of 258,857 boxes for the 1938-1939 season?

A. (Referring to paper.) I couldn't answer that; you will have to analyze the records to find out.

Q. A small amount or large amount?

A. A very small amount.

Q. How much went into the figures for the 1939-1940 season?

A. I don't know but my impression is a very small amount.

Mr. Garrett:

That's all.

(Witness excused.)

Mr. Reeves:

If your Honor please, with the permission of opposing counsel, I would like to read into the record the populations of some of the towns referred to in the testimony, according to the 1930 and 1940 Federal Census. (Reading):

Town	1930	1940
Auburndale	1,849	2,723
Haines City	3,037	3,890
Loughman	806	406

Davenport	650	640
Lake Alfred	629	920
Lake Hamilton	399	344
Dundee	615	694
Babson Park	702	798
Lakeland	18,554	22,068
Lake Wales	3,401	5,024

The census which we have before us does not show Lucerne Park, and it appears from this that Loughman is not incorporated because it gives the precinct, and the figures for Babson Park is for the entire precinct.

Now, if your Honor please, I think we are about finished with this particular phase of the case, but we have some other witnesses who have come in this afternoon and if agreeable to the Court and opposing counsel, we would like, at this time, to adjourn until tomorrow morning so that we will be prepared to go ahead in the morning.

Mr. Garrett:

What do you propose to prove. I am wondering if you have not enough in here to enable us to go ahead with argument.

. . . . Thereupon, a discussion was had off the record.

Mr. Garrett:

In substitution for proof and in order to proceed without the taking of testimony on that feature, counsel for plaintiffs will admit the facts set forth in Paragraph 3 of the 5th defense as amended.

Mr. Reeves:

If your Honor please, if you will look at the bottom of Page 8 beginning of Paragraph 7, the defendant contends that the definition of area of production is void

and of no effect for a long number of reasons set forth at Pages 9, 10 and 11, and without evidence to support those reasons we are at a loss. We can't argue those to the Court unless we have evidence to support them. Of course, if Mr. Garrett is willing to acknowledge those facts are true upon which they are predicated, why, we will be delighted. However, I don't see how in the world we can be cut off from that part of our defense merely because he admits the facts set forth in another paragraph.

. . . . Thereupon, a discussion was had off the record.

Mr. Garrett:

In order to avoid the necessity of taking further testimony the plaintiffs admit the facts set forth in sub-paragraph 3 of the 5th Defense, as amended, and that part of Paragraph 8 of the 5th Defense, as amended, which begins, "That there is produced within a radius of 10 miles . . .", and concludes with the word "establishment".

The Court:

I think it is senseless to bring an array of witnesses in here to testify to something that has been admitted. I don't think we should take testimony on what has been admitted. However, we will let it go until 9:30 tomorrow morning.

. . . . Thereupon, the Court recessed.

. . . . Whereupon, at 9:30 o'clock in the forenoon, Thursday, December 3rd, 1942, in the United States District Court Room, Federal Building, Orlando, Florida, trial of the above entitled case resumed before the Hon. William J. Barker, Judge of the above styled Court, there being present the same appearances, and the following proceedings were had, done, and entered of record, to-wit:

Mr. Reeves:

If the Court please, we are ready to accept. We will accept that suggestion and we will not offer any more testimony in support of this 5th Defense.

Stipulation.

It is stipulated by and between counsel for the respective parties that the facts alleged in the 3rd Paragraph of the 5th Defense, as amended, filed by the defendant, are admitted to be true and may be considered as the facts in this case as if otherwise proven.

In addition to the facts alleged in Paragraph 3, the plaintiffs likewise admits as true the allegation in Paragraph 8 as follows:

"That there is produced within a radius of 10 miles of the establishment approximately 1,000,000 boxes of citrus fruit each season, being much more citrus fruit than the total quantity annually obtained by the defendant for use in its establishment".

Mr. Reeves:

If your Honor please, we offer in evidence certified copy of the decree entered by Judge Akerman in the case of Lake Wales Citrus Growers, v. Andrews which was filed in this Court on July 11th, 1939, and the record certified to by the Clerk of the Court under seal of the Court.

Mr. Garrett:

To which offer we make numerous and serious objections without making any objection whatever to the Court taking whatever judicial notice of that as he sees fit to take. Whether or not he can take judicial notice of it, we waive that, but as to being a part of the record or proof, we take exception. One reason, the same parties

involved there are not the parties involved here. The parties involved in that case were never a party, either by inference or otherwise, and the root of it is the decree was reversed and set aside, and while it may have been reversed on only one point in regard to which the Circuit Court of Appeals deemed it defective, there is no reason in the world to assume that if that point had not existed the Circuit Court of Appeals would not have reversed it for some other reason that might be relevant in this case. It isn't the law and it isn't a part of the issues in this case and it ought not be filed as evidence in this case because it has no approach to the ingredients of the evidence here. It doesn't in any way effect our situation, and would be described by the Latin masters as res inter alios actum—between other parties.

Mr. Reeves:

We don't contend this is res adjudicata, but we feel that the Court can take judicial knowledge of that opinion and for the convenience of the Court, more than anything else, we have produced this decree and ask the Court to let it be filed. If the Court admits it could be harmless error, the Clerk can get that report for the Court.

The Court:

The Court has access to it anyway; there is no use to build up this record. Objection sustained.

Mr. Reeves:

May we ask permission to leave this with the files for your Honor's convenience.

Mr. Garrett:

That's all right. You can have it marked for identification.

Mr. Reeves:
Mark it for identification.

. . . . . Thereupon, the document last referred to was marked Defendant's Exhibit No. J for Identification.

Mr. Reeves:
That's all for the defendant.

Mr. Garrett:
I would like counsel for the defendant to stipulate as follows:

During the seasons herein and throughout that are involved in this case there were more than 10 employees in the canning factory engaged in the operation known as peelers, and more than 10 engaged in the operation known as sectionizers, and more than 10 engaged in the operation known as inspectors, and more than 5 engaged in the operation known as piece checkers, and 2 floor walkers and less than 5 hour hands. Is that correct?

Mr. Reeves:
The defendant does not concede that the number of employees in any of the classifications, or in all of them, are material to the issues, but will concede that to be the facts.

Stipulation.

It is stipulated that the two seasons involved are 1938-1939 and 1939-1940, and that during these seasons the establishment operated as follows:

1. Beginning the season November 14th, 1938, and ending on May 26th, 1939, and that during that period of

time the plant was in actual operation from November 14th, 1938, to and including December 31st, 1938, consisting of 7 work weeks; that from January 1st, 1939, to May 26th, 1939, there were 31 work weeks.

2. That the plant began operations on November 16th, 1939, and operated to and including March 30th, 1940, and that during this period of time the plant was in actual operation 6 work weeks from November 16th, 1939, to December 31st, 1939, and in actual operation 13 work weeks from January 1st, 1940, to March 30th, 1940.

That the usual and customary operating season for citrus canners in Florida is approximately from November 1st to June 1st, depending upon supply and demand, climatic conditions and so forth.

Mr. Garrett:

If the Court please, on this hearing the facts of the complaint stand admitted. You are now determining the sufficiency of an affirmative plea and that only, and, therefore, the fact that we have made allegations that we were underpaid and over-worked is not necessary to be proved, but stands affirmed for the time being.

Mr. Reeves:

I understand, Mr. Garrett, that is not involved at all.

The Court:

It is a question now of whether or not the 5th Defense is proven.

. . . . Thereupon, a discussion was had off the record.

Mr. Reeves:

Counsel having announced the purpose of putting this witness on, the defendant objects to this line of testimony

on the ground that it is immaterial and irrelevant and has no bearing upon the issues in this cause, the Court having heretofore entered an order that the purpose of this hearing, that it would be considered that that part of the definition limiting the number of employees would be discarded and not considered.

The Court:

I will withhold my ruling and allow her to testify.

170 MRS. SALLY BAKER, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Garrett:

Q. What is your name?

A. Sally Baker.

Q. Did you work for the Holly Hill Fruit Products, Inc., at Davenport, Florida, during the seasons of 1938-1939, 1939-1940?

A. Yes.

Q. During and throughout the season of 1938-1939, 1939-1940?

A. Yes.

Q. What job did you have with them?

A. Floor lady; assistant floor lady.

Q. In what department of their business?

A. In the cannery department.

Q. As such were you familiar with the number of employees working there in the cannery during and throughout those seasons?

A. I think I am.

Q. Approximately how many peelers did you have during and throughout those seasons?

A. I should say in '38 and '39 between 40 and 50.
Q. And during the subsequent season, how many?
A. You mean in '41?
Q. No, between '39-'40?
A. Between 40 and 50 all during the time.
Q. How many sectionizers?
A. In the year 1938 and part of 1939, we had around 175.
Q. '39-'40?
A. We had 200.
Q. How many of these employees were piece workers?
A. That was piece workers—sectionizers.
Q. They got paid for how much they did?
A. Yes, sir.
Q. Regardless of the hours they put in?
A. Yes, sir.
Q. How many of the workers in the cannery—

Mr. Reeves: (Interrupting):
We move to strike the testimony of Mr. Garrett to which the witness agreed on the ground that it is immaterial and irrelevant. He gets into a feature of the case that the Court is not taking testimony on, to-wit: Whether a piece worker is paid by the piece regardless of the hours worked.

The Court:
I don't see where that feature is material at this time.

Mr. Garrett:
Q. How many were hour hands?
A. Well, we had 6 inspectors, what we call them, and in 1938 and part of 1939; and then in 1939-1940 we had 5 checkers and 2 inspectors that stood inside of the belts.
Q. Were floor walkers hour hands?
A. They were.

Q. How many did you have in each season?
A. 2.
Q. Did they have piece checkers?
A. That was the checkers—the 5.
Q. What about peelers? Were they hour hands?
A. No, piece workers.
Q. Anybody else working there in the cannery except those peelers and sectionizers were hour hands?
A. There were can boys.
Q. They were all hour hands except the sectionizers and peelers?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.
Q. The whole season?
A. Yes, sir.

Mr. Garrett:
That's all.

Mr. Reeves:
No questions.

(Witness excused.)

. . . . Thereupon, the hearing in the above entitled cause adjourned.

174 DEFT'S. EX. A.

Filed in Evidence, Dec. 2, 1942. Edwin R. Williams, Clerk.

Amended
Articles of Incorporation
of
Holly Hill Fruit Products, Incorporated.

Know All Men By These Presents: That we, the undersigned producers of citrus fruit in the State of Florida,

do hereby voluntarily associate ourselves together for the purpose of forming a non-profit, co-operative marketing association, with capital stock, under "The Agricultural Cooperative Act" of the State of Florida.

Article I.

The name of this association shall be Holly Hill Fruit Products, Incorporated.

Article II.

This association is organized for the purpose of engaging in any cooperative activity in connection with the producing, marketing or selling of agricultural products; with the growing, harvesting, preserving, drying, processing, canning, packing, grading, storing, warehousing, handling, shipping, and utilizing such products; the manufacturing or marketing of the by-products thereof; and in connection with any of the activities mentioned herein, the manufacturing, selling and supplying of machinery, equipment or supplies; and in the financing of any of the above enumerated activities; and in performing and furnishing business or educational services, on a cooperative basis for those engaged in agricultural as bona fide producers of agricultural products or in any one or more of the activities specified herein.

Article III.

The general nature and powers of the business or businesses to be transacted by this association shall be as follows:

(a) To engage in any activity in connection with the producing, marketing, selling, preserving, growing, har-

vesting, drying, processing, manufacturing, canning, packing, grading, warehousing, storing, handling or utilizing of agricultural products, especially citrus products; or in the manufacturing or marketing of the by-products thereof; or in any activities in connection with the manufacturing, purchasing, hiring or using supplies, machinery or equipment; or in the financing of any of the above enumerated activities, or in performing business or educational services, on a cooperative basis, for those engaged in agriculture as a bona fide producers of agricultural products; or in any one or more of the activities specified herein.

(b) To borrow money from any source without limitation as to the amount of corporate indebtedness or liability, with authority to give any kind or form of obligation or security therefor.

(c) To act as agent or representative of any person or persons in any of the above mentioned activities.

(d) To make loans or advances to members and to their members, to non-member patrons, and to non-member patrons of members, with authority to accept therefor any kind, form or type of obligation with or without security; to purchase, indorse, discount, sell or guarantee the payment of any note, draft, bill of exchange, indebture, bill of sale, mortgage or other obligation, the proceeds of which have been advanced or used in the first instance for any of the purposes provided for herein; to discount for or purchase from any association organized under the laws of any State, with or without its indorsement, any note, draft, bill of exchange, indenture, bill of sale, mortgage or other obligation the proceeds of which are advanced or used in the first instance for carrying on any cooperative activity authorized in this act and with authority to dispose of same with or without indorsement.

(e) To purchase or otherwise acquire, to hold, own, and exercise all rights of ownership in, and to sell, transfer, pledge or guarantee the payment of dividends or interest on, or the retirement or redemption of, shares, of capital stock, bonds, or other obligations of any corporation or association, engaged in any directly or indirectly related activity, or in the producing, picking, hauling, packing, shipping, handling, warehousing, financing, canning, preserving, processing, manufacturing, utilizing, marketing, or selling of any of the products handled by the association, or any by-products thereof.

(f) To establish reserves and to invest the funds thereof in bonds or in such other property as may be provided in the By-Laws.

(g) To buy, hold and exercise all privileges of ownership over such real or personal property as may be necessary or convenient for the conduct and operation of any of the business of the association, or incidental thereto;

(h) to sell, convey, and transfer all of the assets of this association; provided, such sale shall be consented to by the holders of not less than two-thirds of its common stock, which consent shall be given either in writing, or by vote at a special meeting of its stockholders called for that purpose.

(i) To establish, secure, own and develop patents, trade-marks and copyrights.

(j) To do each and everything necessary, suitable or proper for the accomplishment of any one of the purposes, or the attainment of any one or more of the objects herein enumerated or conducive to or expedient for the interest

or benefit of the association, and to contract accordingly; and in addition, to exercise and possess all powers, rights and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged, and any other rights, powers and privileges granted by the laws of this state to corporations for profit; except such as are inconsistent with the express provisions of the laws of this State; and to do any such thing anywhere.

(k) This association shall not deal in products, handle machinery, equipment or supplies or perform services for and on behalf of non-members to an amount greater in value than such as are dealt in, handled or performed by it for and on behalf of its members during the same period.

(l) To also have any powers hereinafter granted to co-operative associations by subsequent amendments to the Laws under which this association is incorporated.

Article IV.

The principal place of business of this association is to be Davenport, in the County of Polk, and State of Florida.

Article V.

The term for which this association shall exist is fifty (50) years from the date of its incorporation.

Article VI.

The business of this association shall be conducted by a Board of Directors in such number as shall be designated by the By-Laws, which in no event shall be less

than three. Any legally called meeting of the stockholders in which a majority of the stock is represented may increase or decrease the number of Directors by amendment to the By-Laws. The term of office of a Director shall expire at the next annual meeting of the association after his election or until his successor is elected by the stockholders.

Article VII.

The names and residences of the directors of this association who are to conduct the business thereof until their successors are elected and qualified, are:

D. H. McConnell, Suffern, New York; Herman H. B. Meyer, Washington, D. C.; D. W. Smith, Chicago, Illinois; R. H. Dewson, Boothbay Harbor, Maine; R. B. Huffaker, Bartow, Florida; R. M. Atkins, Port Huron, Mich.; W. A. Nicholson, Davenport, Florida.

Article VIII.

As Amended.

This Association shall be a capital stock corporation. The maximum number of shares of stock that it is hereby authorized to have outstanding at any one time shall be fifteen thousand (15,000) shares, of the par value of Twenty ($20.00) Dollars per share. Of the said authorized capital stock, twelve thousand nine hundred and fifty (12,950) shares shall be designated common stock and two thousand and fifty (2,050) shares shall be designated six per cent. cumulative preferred stock. Upon redemption of the preferred stock authorized by Amended Article VIII (d) of the Charter, each share of preferred stock so redeemed shall be added to the number of shares

of common stock hereby authorized, to the end that upon redemption of all of said preferred stock the total number of shares of authorized common stock shall be restored to 15,000 shares. The common stock of the corporation now outstanding, or to be issued hereafter, and the preferred stock hereby authorized and when issued, shall be subject to the following conditions and restrictions:

(a) The common stock of this Corporation shall be issued to, and sold and owned only by owners of bearing citrus fruit groves whose groves are located within Townships 26 and 27, South and Range 27, East, Polk County, Florida, and on the basis of five shares per acre for each acre of such bearing citrus fruit grove, and upon the further condition that such grove owner shall market the citrus fruit so grown by him through this Corporation; provided, however, that no stockholder shall hold more than one-third of the outstanding capital stock of the association, whether of common or preferred stock or of both. The right of owners of common stock to vote at stockholders meetings, except as hereinafter provided, shall be limited and confined to stockholders who qualify under the above conditions.

(b) The property right of any owner of common stock who shall lose his voting right at stockholders' meetings by ceasing to be a qualified stockholder in the corporation as defined in the preceding paragraph, Article VIII (a), shall not be affected by the loss of such voting rights but the Board of Directors of the association may call in and retire such stock, and in such case the value of said stock shall be conclusively and equitably appraised by the Board of Directors at not less than par, and said stock shall be purchased and paid for by the corporation at the appraised value within one year after the appraisement

thereof. This provision, except as hereinafter provided, shall apply to outstanding stock not now qualified to be voted at stockholders' meetings in accordance with the foregoing conditions and restrictions as well as to present qualified stock that shall afterwards lose voting rights.

(c) All stock of the corporation now outstanding and qualified to vote at stockholders meetings in accordance with the foregoing conditions and restrictions shall be recalled and re-issued to the present qualified owner or owners, with all conditions and restrictions, including the provisions for appraisal and purchase of non-voting stock, as hereinbefore provided, made a part of the new certificate or certificates of stock.

(d) There shall be created and issued enough six per-cent. cumulative preferred stock of the par value of $20.00 per share to be exchanged for all of the Syndicate Stock now outstanding and which was issued pursuant to the agreement of the corporation with D. H. McConnell, E. H. Dewson, and Fred S. Bates, as Trustees, dated April 15, 1930. The said stock shall have voting rights at all stockholders' meetings, but shall not participate in dividends declared on common stock. The corporation shall have the right, however, of redeeming all or any part of the said Syndicate Stock at par in preference to issuance of said preferred stock in exchange therefore, and upon the issuance of any of said preferred stock it shall be made a condition thereof that the corporation may at any time and upon thirty days written notice purchase and retire said stock at par with the accrued guaranteed interest thereon to date of redemption.

Upon the purchase by the corporation of any of said preferred stock it shall not be re-issued, but with the written assent of a majority of the Board of Directors

an equivalent number of shares of common stock may be issued and sold to qualified stockholders in such amounts as may be needed to complete their allowable quota.

It shall be further provided, however, that any holder and owner of any of said Syndicate Stock who is qualified to own common stock of the corporation shall have the right to elect to retain as voting and participating common stock of the corporation five shares for each acre of qualified bearing citrus groves owned by such stockholder, or sufficient of such stock when added to other common stock owned by the owner that shall not exceed five shares per acre of qualified bearing grove and in the aggregate not more than one-third of the outstanding capital stock, and upon the exercise of such option the said Syndicate Stock shall not be redeemed, nor shall preferred stock be issued therefor. Each owner of Syndicate Stock shall be given thirty days written notice of such election and such election shall be exercised within said thirty days. Otherwise the provision as to redemption of said Syndicate Stock or the exchange therefor of preferred stock shall prevail. Upon the exercise of the option herein granted to owners of any of said Syndicate Stock to retain common stock in the place of said preferred stock, the common stock so retained instead of said preferred stock shall be re-issued as provided by Article VIII (c).

(e) Upon the purchase and retirement of non-voting common stock, the officers of the corporation shall endeavor to sell and issue an equal amount of treasury common stock to qualified grove owners at a price to be fixed by the Board of Directors, to the end that as many qualified citrus growers as possible within said territory shall become members of the association and shall own five

shares of common stock for each acre of bearing grove, but so that no one grower shall own more than one-third of the outstanding capital stock.

Amended Article IX.

No dividend on the common stock of this Association shall be declared at a rate in excess of eight (8%) per centum per annum. All profits in excess of eight (8%) per centum may be used by the association for the purpose of establishing and accumulating reserves, including a permanent surplus fund as an addition to capital, or in the proper exercise and expansion of its functions, or in distribution to its producers on the basis of patronage.

Amended Article X.

The By-Laws of this association, subject to the provisions of the articles of association, shall provide the method of issuance, retirement and transfer of its stock.

Amended Article XI.

Every holder of common stock of record shall be entitled at each meeting of the stockholders of this association and upon each proposal presented at such meeting to one vote for each and every share of stock standing in his name on the books of the association, subject to the limitation that no stockholder may own more than one-third (1/3) of the outstanding capital stock of the association. The common stock of a member of the association, who ceased to be the owner of a bearing citrus fruit grove located within Townships 26 and 27, South, and Range 27, East, or being the owner of such grove and does not market the citrus fruit so grown by him through this association, shall lose all voting rights and privileges un-

til it becomes vested in the hands of a qualified grove owner.

Article XII.

The officers of this corporation shall be a President, one or more Vice-Presidents, a Secretary and a Treasurer, and one or more Assistant Secretaries and Assistant Treasurers, and Managers, all of which shall be elected by the Board of Directors at the time and in the manner prescribed by the By-Laws.

Article XIII.

These articles of incorporation can be altered or amended at any annual meeting or any special meeting called for that purpose, provided such amendments are passed and filed with the Secretary of the State of Florida under and according to appropriate provisions of law.

Article XIV.

These Articles of Incorporation are adopted under Section Twenty-three (23) of "The Agricultural Cooperative Act" of the State of Florida, by a majority vote of all the stockholders of Holly Hill Fruit Products, Incorporated, a corporation for profit heretofore organized and existing under the laws of the State of Florida, in order to bring said corporation under the provisions of said "The Agricultural Cooperative Act" of the State of Florida by adopting the various restrictions as provided for in said Act. These Articles of Incorporation are filed by the incorporating Directors as named herein, who are the present members of the present Board of Directors of Holly Hill Fruit Products, Incorporated, a corporation for profit under the laws of the State of Florida, in accordance with

the decision of the stockholders, by a majority vote thereof, to accept the benefits and be bound by the provisions of the said "The Agricultural Cooperative Act" of the State of Florida.

In Witness Whereof the foregoing Articles of Incorporation of Holly Hill Fruit Products, Incorporated, are hereby subscribed by the undersigned incorporators and are acknowledged by one of said incorporators before an officer authorized by law to take and certify acknowledgments of deeds and conveyances all for the purpose of filing said Articles of Incorporation in accordance with the law of the office of the Secretary of the State of Florida.

D. H. CAMPBELL, (Seal)
HERMAN H. B. MEYER, (Seal)
D. W. SMITH, (Seal)
E. H. DEWSON, (Seal)
R. B. HUFFAKER, (Seal)
R. M. ATKINS, (Seal)
W. A. NICHOLSON. (Seal)

Amended Articles of Incorporation of Holly Hill Fruit Products, Incorporated Filed in the Office of the Secretary of State February 9, 1934. Amendments to Articles VIII, IX, X and XI filed in the Office of the Secretary of State February 3, A. D. 1938.

I, G. B. Howe, the duly qualified elected and acting secretary of the Holly Fruit Products, Inc., do hereby certify that the above and foregoing is a true and correct copy of the Charter of said Corporation as amended.

Witness my hand and official seal of the said corporation at Davenport, Florida this 20th day of October, 1942.

G. B. HOWE,
(Corporate Seal) Secretary, Holly Hill Fruit Products, Inc.

180 DEFT'S EX. B.

Addison,
vs. 441 Civ. T.
Holly Hill Fruit Products.

Filed in Evidence Dec. 2, 1942. Edwin R. Williams, Clerk.

By-Laws of Holly Hill Fruit Products, Incorporated, a Corporation Created and Existing Under the Provisions of Chapter 14675, Laws of Florida, 1931, Known as the Agricultural Cooperative Act, a Non-Profit, Cooperative Marketing Association.

Article I.

Name and Location.

Section 1. The name of this corporation shall be Holly Hill Fruit Products, Incorporated, a non-profit, cooperative marketing association under the Agricultural Cooperative Act of the State of Florida.

Section 2. Its principal office shall be located at Davenport, Polk County, Florida. The Association shall have the right to establish branch offices and places of business at other places in the State of Florida and other States of the Union.

Amended Article II.

Capital Stock.

Section 1. The capital stock of this Association shall consist of fifteen thousand (15,000) shares, of the par value

of twenty ($20.00) Dollars per share. Of the said authorized capital stock, twelve thousand nine hundred and fifty (12,950) shares shall be designated common stock and two thousand and fifty (2,050) shares shall be designated six per cent. cumulative preferred stock. Upon redemption of the preferred stock authorized by Amended Article VIII (d) of the Charter, each share of preferred stock so redeemed shall be added to the number of shares of common stock hereby authorized, to the end that upon redemption of all of said preferred stock the total number of shares of authorized common stock shall be restored to 15,000 shares.

Restrictions.

Section 2. The common stock of this Corporation shall be issued to, and sold and owned only by, owners of bearing citrus fruit groves whose groves are located within Townships 26 and 27, South, and Range 27 East, Polk County, Florida, and on the basis of five shares per acre for each acre of such bearing citrus fruit grove, and upon the further condition that such grove owner shall market the citrus fruit so grown by him through this Corporation; provided, however, that no stockholder shall hold more than one-third of the outstanding capital stock of the association, whether of common or preferred stock or of both. The right of owners of common stock to vote at stockholders meetings, except as hereinafter provided, shall be limited and confined to stockholders who qualify under the above conditions.

Voting Rights.

Section 3. Every holder of preferred stock of record and every holder of common stock of record owned by qualified common stockholders as defined in Article II,

Section 2 hereof, shall be entitled at each meeting of the stockholders of this Association, and upon each proposal presented at such meeting, to one vote for each and every share of stock standing in his name on the books of the Corporation.

Loss of Voting Rights.

Section 4. The common stock of any stockholder or member of this Association who ceases to be a qualified common stockholder as defined in Article II, Section 2 hereof, shall lose all voting rights and priviléges until said stock shall become vested again in the hands of a qualified stockholder.

Appraisal of Stock.

Section 5. The property right of any owner of common stock who shall lose his voting right at stockholders' meetings by ceasing to be a qualified stockholder in the corporation as defined in Article II, Section 2, hereof, shall not be affected by the loss of such voting rights; but the Board of Directors of the Association may call in and retire such stock and in such case the value of said stock shall be conclusively and equitably appraised by the Board of Directors at not less than par, and said stock shall be purchased and paid for by the corporation at the appraised value within one year after the appraisement thereof. This provision, except as hereinafter provided, shall apply to outstanding stock not now qualified to be voted at stockholders meetings in accordance with the foregoing conditions and restrictions as well as to present qualified stock that shall afterwards lose voting rights.

Calling in and Re-Issuance of Stock.

Section 5a. All stock of the corporation except the Syndicate Stock issued pursuant to the agreement of April

15, 1930, for which preferred stock shall be exchanged, now outstanding and owned by qualified stockholders as defined in Article II, Section 2, hereof, shall be recalled and re-issued to the present qualified stockholders, with all conditions and restrictions, including the provisions for appraisal and purchase of non-voting stock, as provided by Amended Article VIII of the Charter and by these By-Laws, incorporated into and made a part of the certificate of stock; provided, however, that any such stockholder may elect to retain his present certificate or certificates of stock, but in such event the said stockholder shall attach to his certificate or certificates of stock a rider provided by the secretary of the association certifying to the fact that the said stock is subject to said conditions and restrictions.

How Stock Issued.

Section 6. All certificates of stock shall be signed by the President or Vice-President and the Secretary and shall be sealed with the corporate seal.

Transfer of Stock.

Section 7. Transfers of stock shall be made only on the books of the Corporation; and the old certificate properly indorsed shall be surrendered and canceled before a new certificate is issued; but no stock shall be transferred to anyone who is not engaged in the production of citrus fruits in the State of Florida.

Loss of Stock.

Section 8. In the case of loss or destruction of a certificate of stock no new certificate shall be issued in lieu thereof, except upon satisfactory proof to the Board of

Directors of such loss or destruction. Any such new certificate shall be plainly marked "duplicate" upon its face.

Article III.

Amended.

Stockholders' Meetings.

Annual Meeting.

Section 1. An annual meeting of the Stockholders shall be held at 10:00 A. M. on the first Tuesday in March in each year at the office of the Association, Davenport, Florida; if such day shall fall upon a legal holiday the meeting shall be held on the next succeeding business day. At such meeting the stockholders shall elect the directors to serve until their successors shall be elected and qualified.

Special Meetings.

Section 2. The Board of Directors shall have the right to call a special meeting of the stockholders at any time. Written notice of all special meetings, together with a statement of the purposes thereof shall be mailed to each stockholder at least ten days prior to the meeting.

Notice of Stockholders' Meetings.

Section 3. Notice of the time and place of annual and special meetings shall be mailed by the Secretary to each stockholder at his place of residence as shown upon the stock book of the Association not less than ten days before the date thereof.

Presiding Officer at Stockholders' Meetings.

Section 4. The President, or in his absence either Vice President, shall preside at all stockholders' meetings.

Voting by Proxy.

Section 5. At every stockholders' meeting the vote of a qualified stockholder may be cast by him by proxy. All proxies shall be in writing and shall be filed with the Secretary and by him entered of record in the minutes of the meeting.

Quorum.

Section 6. A quorum for the transaction of business at stockholders' meeting shall consist of the number of persons representing a majority of the shares of stock, entitled to vote, issued and outstanding, but the stockholders present at any meeting, though less than a quorum, may adjourn the meeting to a future time.

Order of Business.

Section 7. At the annual meeting of stockholders the following shall be the order of business, viz.:

1. Calling Roll.
2. Reading notice and proof.
3. Report on, and verification of, proxies.
4. Report of officers.
5. Report of Committees.

6. Unfinished business.

7. New business.

8. Election of Directors.

9. Miscellaneous business.

Article IV.

Directors.

Qualifications and Vacancies.

Section 1. The business and property of the Association shall be managed by a board of seven directors who shall be stockholders and co-operating producers of the Association and who shall be elected annually by the stockholders for the term of one year, and shall serve until the election and acceptance of their duly qualified successors. Any vacancy occurring other than by the expiration of term may be filled by the remaining members of the Board by a majority vote, for the unexpired term.

Regular Meetings.

Section 2. A regular meeting of the Board of Directors shall be held in the office of the Association immediately after the adjournment of each annual stockholders' meeting.

A regular monthly meeting of the Board of Directors may be held in the principal office of the Association in Davenport, Florida, or at any other place in or out of the State of Florida, agreeable to the majority of the directors, on the first Tuesday of each month at 11:00 A. M.,

if not a legal holiday, and if a legal holiday, then on the next business day following. If a regular meeting is held at any place other than the principal office of the Company in Davenport, Florida, notice of such meeting must be mailed to each director at least fifteen days prior to such meeting. The Board of Directors shall meet regularly at least once each year.

Special Meetings.

Section 3. A special meeting of the Board of Directors may be held in the principal office of the Company in Davenport, Florida, at any time on call of the President or of any three members of the Board. Upon request of any three directors the President must call a special directors' meeting.

A special Directors' meeting may be held at any time or place in or out of the State of Florida agreeable to the majority of the Directors. The Secretary must mail to each Director a notice of any special meeting fifteen days prior to the date of any special Directors' meeting, whether at the office of the Company or at any other place in or out of the State of Florida. However, any special Directors' meeting may be held at any time or place in or out of the State of Florida, without notice when all members are present and participate in such meeting; or special directors' meeting may be held at any time or place in or out of the State of Florida without notice when agreed to in writing by all directors.

Quorum of Boa.d.

Section 4. A quorum at any meeting shall consist of a majority of the entire membership of the Board. A majority of the Directors present shall decide any question that may come before the meeting.

Election of Officers of the Association.

Section 5. Officers of the Association shall be elected by the Board of Directors at their first meeting after the election of Directors each year. If any becomes vacant during the year the Board of Directors shall fill the same for the unexpired term. The Board of Directors shall fill the same for the unexpired term. The Board of Directors shall fix the compensation of all officers of the Association.

Election or Appointment of Officers Other Than Those Provided for in the Charter.

Section 6. The Board of Directors may designate one of the Vice Presidents to perform the duties usually performed by a general manager of a corporation. Such Vice President, under the direction of the Board of Directors, shall employ and discharge all employees, agents and laborers of the Association. The Board of Directors may appoint such additional officers as shall be required to carry on the business of the Association, such officers to serve at the pleasure of, and on terms and conditions set by, the Board.

Order of Business.

Section 7. The order of business at any regular or special meeting of the Board of Directors shall be:

1. Reading and disposal of any unapproved minutes.

2. Report of officers and committees.

3. Report of Executive Committee.

4. Unfinished business.

5. New business.

6. Adjournment.

Article V.

Executive Committee.

Section 1. The Board of Directors may elect an Executive Committee of four members, two of whom need not be members of the Board, but two of the members of this Committee shall be members of the Board of Directors, and one of such members shall be the President of the Corporation. The Chairman of the Executive Committee shall be the President of the Corporation, and such Committee shall serve at the pleasure of the Board of Directors, except the President.

Duties and Powers.

Section 2. The Board of Directors may allot to such Executive Committee all or any stated portion of the functions and powers of the Board of Directors, subject to the general direction and control of the entire Board.

Reports.

Section 3. All actions by the Executive Committee taken in behalf of the Board of Directors shall be reported to the Board of Directors at its meeting next succeeding such action, and shall be subject to revision or alteration by the Board of Directors; provided that no rights or acts of third parties shall be affected by any such revision or alteration.

Article VI.

Officers.

Section 1. The officers of this Association shall be a President, one or more Vice Presidents, a Secretary and a Treasurer; and such other officers as may be deemed necessary by the Board of Directors, including a General Manager, but the Board of Directors shall have the power as provided in section 6 of Article IV of these By-Laws, instead of electing a General Manager, to designate one of the Vice Presidents to perform the duties usually performed by a general manager of a corporation.

Terms of Office.

Section 2. The term of office of each officer provided for in section one, shall be for one year, or until the election and acceptance of office by his successor.

Secretary-Treasurer.

Section 3. The office of Secretary and Treasurer may be combined into one office designated as Secretary-Treasurer, or both functions and title may be united in one person.

Duties of Officers.

Section 4. President. The President shall preside at all directors and stockholders meetings, shall have general superintendence over the affairs of the Association and over the other officers, shall sign all stock certificates and written contracts of the corporation, and shall perform all such other duties as are incident to his office. In case of the absence or disability of the President, his duties shall be performed by a Vice-President.

Section 5. Secretary. The Secretary shall issue notices of all directors and stockholders meetings and shall attend and keep the minutes of the same, shall have charge of all corporation books, records and papers, shall be custodian of the corporate seal, shall attest with his signature and impress with the corporate seal all stock certificates and written contracts of the corporation and shall perform all other duties as are incident to his office.

Section 6. Treasurer. The Treasurer shall have custody of all moneys and securities of the corporation. He shall keep regular books, of account and shall submit them, together with all of his vouchers, receipts, records and other papers to the directors for their examination and approval as often as they may require, and shall perform all such other duties as are incident to his office.

Article VII.

Finances.

Section 1. No dividend on the stock of this association shall be declared at a rate in excess of eight (8%) per centum per annum. All profits in excess of eight (8%) per centum may be used by the association for the purpose of establishing and accumulating reserves, including a permanent surplus fund as an addition to capital, or in the proper exercise and expansion of its functions, or in distribution to its producers on the basis of patronage.

Section 2. Funds of the Association shall be deposited in such bank or trust company as the Directors shall designate and shall be withdrawn only on the check of the Association signed by the President, or a Vice-President, and countersigned by the Treasurer or by the Auditor when so designated by the Treasurer.

Article VIII.

Amendments.

Section 1. Amendments to these By-Laws may be made by a vote of the stockholders representing a majority of all the stock issued and outstanding at any annual or special stockholders' meeting.

I, G. B. Howe, the duly qualified, elected and acting Secretary of the Holly Hill Fruit Products, Inc., do hereby certify that the above and foregoing is a true and correct copy of the By-Laws of said Corporation.

Witness my hand and official seal of the said Corporation at Davenport, Florida this 20th day of October, 1942.

G. B. HOWE,

(Corporate Seal) Secretary, Holly Hill Fruit Products, Inc.

189 DEFT'S EX. E.

Addison
vs. 441 Civ-T.
Holly Hill Fruit Products.

Filed In Evidence Dec. 2, 1942. Edwin R. Williams, Clerk.

Holly Hill Fruit Products, Incorporated.

Packers, Canners, Shippers.

A Grower-Owned Organization.

Florida's Finest Tree-Ripened Citrus Fruit
from the Famous Holly Hill Groves,
Davenport, Florida.

Brands:

Holly Hill, Golden Hill, Bonny Hill.

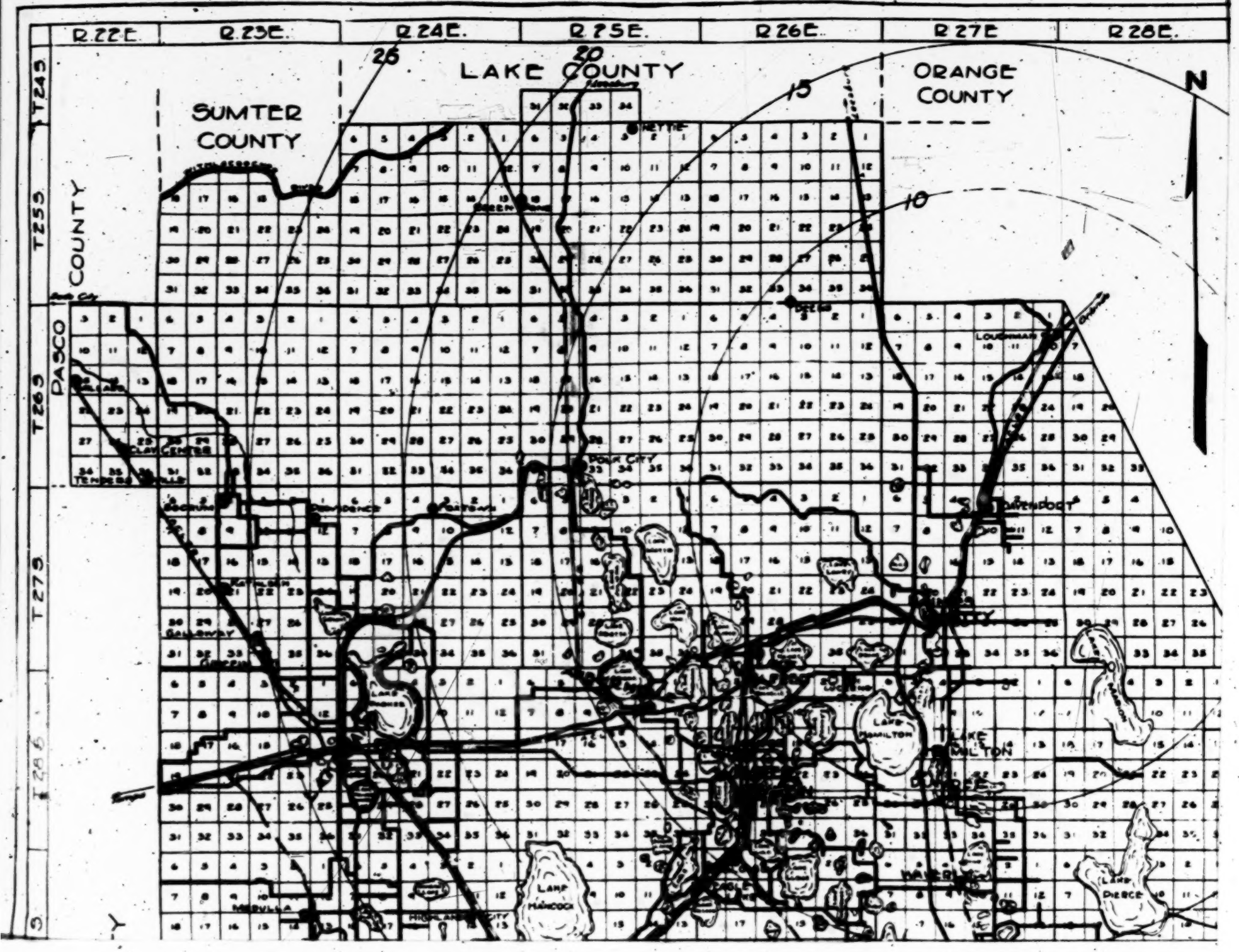
Copyright Registered U. S. Pat Office.

October 26, 1942.

Mr. Harry Strohm,
Davenport,
Florida.

Dear Sir:

As you probably know certain employees of the Holly Hill Fruit Products, Incorporated during the 1938-1939 and 1939-1940 citrus season have instituted suit in the Federal Court against the Company for additional wages allegedly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R.27E
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T24S
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T26S
T27S
T28S
SUMTER COUNTY
LAKE COUNTY
ORANGE COUNTY
PASCO COUNTY
26
20
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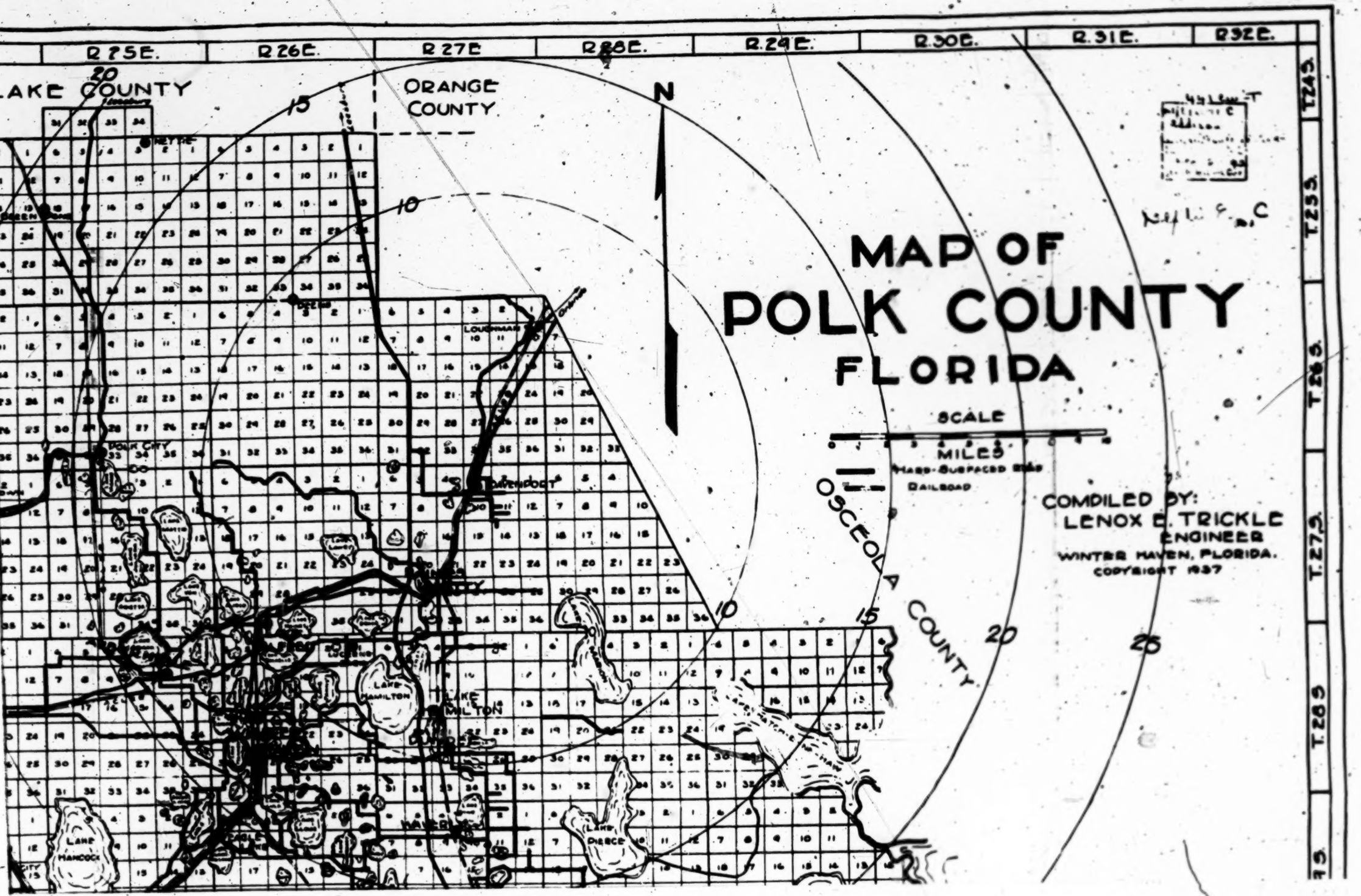
DADE CITY
DAVENPORT
LAKE HAMILTON
LAKE MILTON
LAKE HANCOCK
LAKE PIERCE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LAKE COUNTY
ORANGE COUNTY.
OSCEOLA COUNTY
N
MAP OF
POLK COUNTY
FLORIDA
SCALE
MILES
HARD-SURFACED ROAD
RAILROAD
COMPILED BY:
LENOX E. TRICKLE
ENGINEER
WINTER HAVEN, FLORIDA.
COPYRIGHT 1937
DAVENPORT
DUNDEE
LOUGHMAN
DAVENPORT
DUNDEE
LAKE HAMILTON
LAKE MILTON
LAKE MARIANNA
LAKE PIERCE
LAKE HANCOCK
EAGLE LAKE
HAINES CITY
DOVER
DOVER
DOVER

due them under the Federal Fair Labor Standards Act commonly called the Wages and Hours Law.

This suit has been made a test case for the entire citrus industry and is being handled by attorneys representing the various industry groups.

The outcome of this suit will determine to what extent the entire industry is involved under a Court interpretation of the "area of production".

We list below purchases made from you during the 1938-1939 and 1939-1940 citrus season and will greatly appreciate it if you will advise us the exact location of the grove or groves that this fruit was picked from.

If you are a purchaser of cannery fruit and you bought from Packing Houses, please try to ascertain what groves this fruit came from and location of same, with legal description if possible.

Please describe below the location of the groves producing the fruit which you sold to us. If you cannot ascertain the location of these groves please state the Packing House from whom you purchased this fruit. If you have no record and cannot secure the information requested, please so state in the margin below.

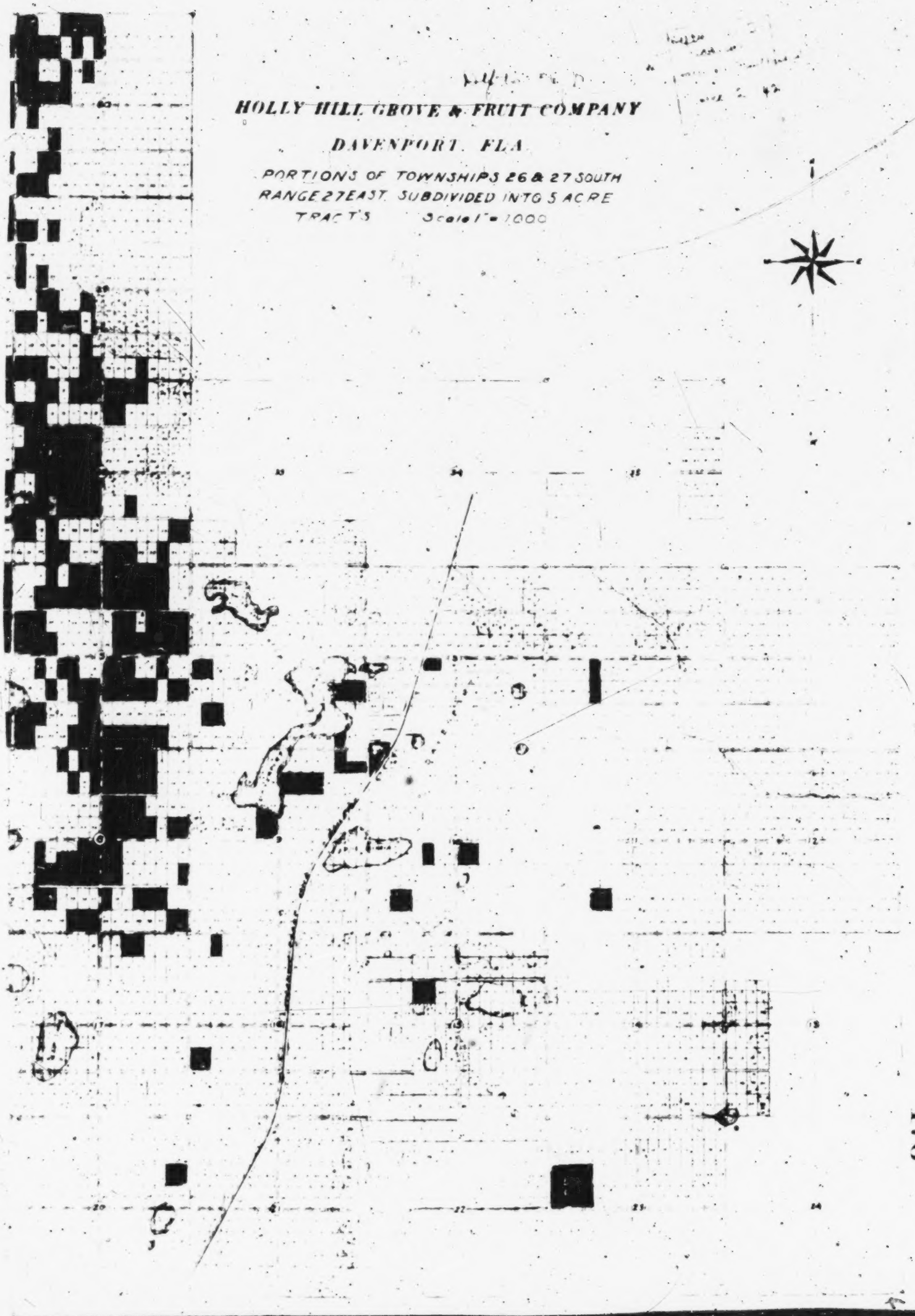
If you require any other information, please call the writer collect at 3211, Davenport.

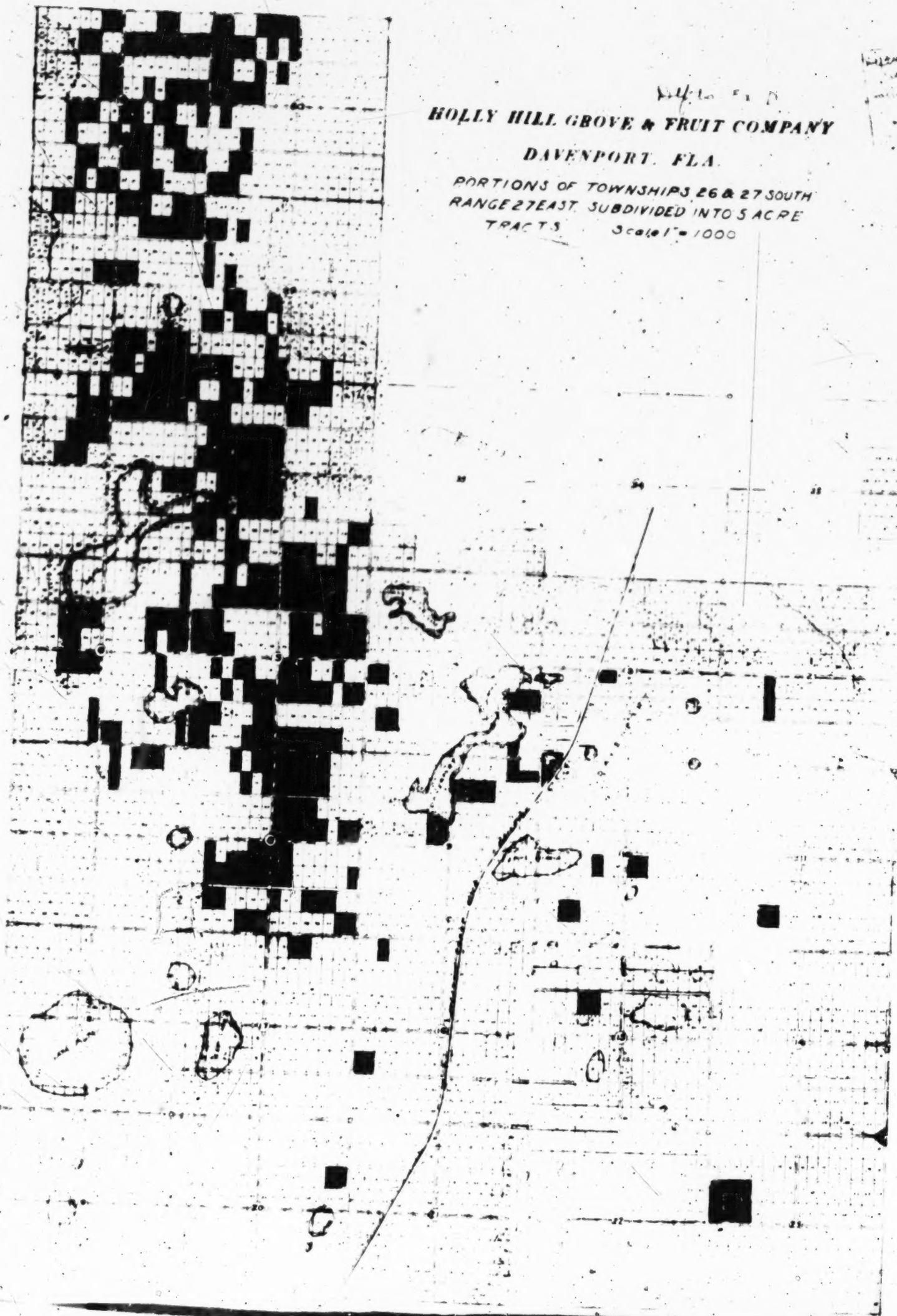
Yours very truly,
HOLLY HILL FRUIT PRODUCTS, INCORPORATED,
W. P. HICKMAN,
(W. P. Hickman);
Treasurer.

WPG:GH

Record of Fruit Purchases.

Date	Boxes of Fruit	Variety	Location of Legal Description of Grove or Groves
5-15-40	863	Oranges	Various groves within Holly Hill Groves area.


HOLLY HILL GROVE & FRUIT COMPANY
DAVENPORT. FLA.
PORTIONS OF TOWNSHIPS 26 & 27 SOUTH
RANGE 27 EAST. SUBDIVIDED INTO 5 ACRE
TRACTS
Scale 1" = 1000


HOLLY HILL GROVE & FRUIT COMPANY
DAVENPORT. FLA.
PORTIONS OF TOWNSHIPS 26 & 27 SOUTH
RANGE 27 EAST SUBDIVIDED INTO 5 ACRE
TRACTS
Scale 1" = 1000

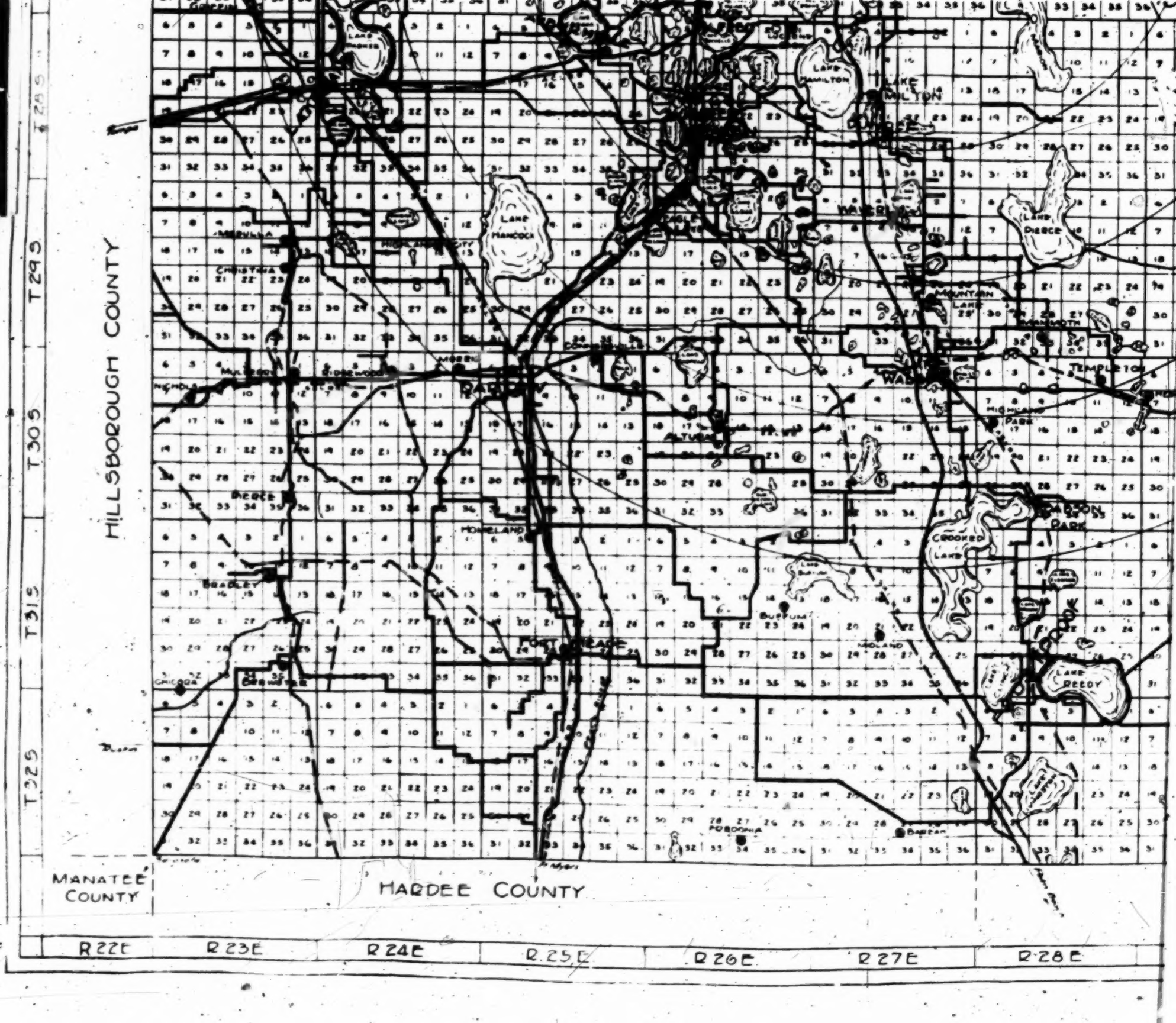
DEFT'S EXHIBIT F.

441 Civ.-T. Addison vs. Holly Hill Fruit Products. Filed in Evidence Dec. 2, 1942, Edwin R. Williams, Clerk.

Holly Hill Fruit Products, Incorporated.

Volume of Fruit Handled for the 1938-1939 and 1939-1940 Citrus Season.

	Boxes 1938-1939 Season	Percent 1938-1939 Season		Boxes 1939-1940 Season	Percent 1939-1940 Season	
Total Combined Volume:						
Packing House and Cannery	702160			458918		
Deduct: Fresh Fruit Packing House Volume	383618			89065½		
Canning Plant Volume	318542	100.00%		369852½	100.00%	
Holly Hill Groves Cannery Fruit	258857	81.26%		262256½	70.91%	
Grapefruit Distributors, Inc., Purchases	59685	18.74%		107596	29.09%	
Analysis of Grapefruit Distributors, Inc., Purchases by Distances of Grove From Cannery			Total			Total
Within 10 Miles	50899	15.98%	97.24%	75746	20.48%	91.39%
Within 15 Miles	1467	.46%		2550	.69%	
Within 20 Miles	0	0		0	0	
Within 25 Miles	4884	1.53%		11413	3.09%	
Over 25 Miles	0	0		0	0	
Unknown	3068	.96%		17995	4.86%	
Total	60318	18.93%		107704	29.12%	
Dumps, Rots, Etc.	633	.19%		108	.03%	
Net Total	59685	18.74%		107596	29.09%	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T30S
T31S
T32S
HILLSBOROUGH COUNTY
MANATEE COUNTY
HARDEE COUNTY
R22E
R23E
R24E
R25E
R26E
R27E
R28E
LAKE HAMILTON
LAKE MANCOCK
LAKE PIERCE
LAKE REEDY
CROOKED LAKE
MOUNTAIN LAKE
LAKE BARTON
LAKE BUFFUM
LAKE CHICORA
LAKE GARFIELD
LAKE ALTURAS
LAKE MARIANNA
LAKE MAMMOTH
LAKE TEMPLETON
LAKE HIGHLAND PARK
LAKE CLOVER
LAKE EAGLE
LAKE CHRISTINA
LAKE BRADLEY
LAKE HOWARD
LAKE POBOCHNA
LAKE DARTAN
LAKE MORRIS
LAKE NICHOLS
LAKE HIGHLAND CITY
LAKE CONGRESS
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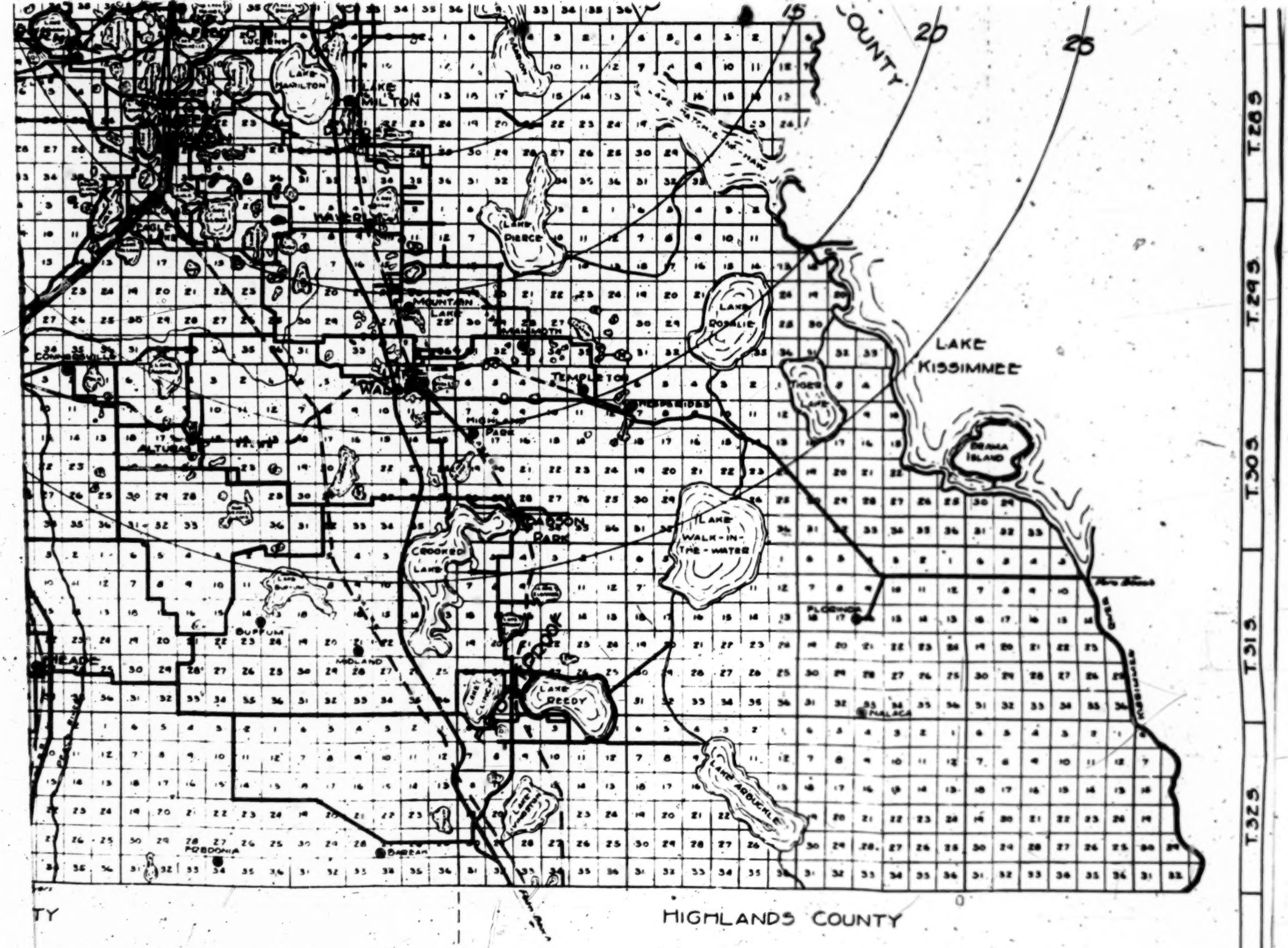
LAKE HAMILTON
LAKE MILTON
LAKE PIERCE
LAKE ROSALIE
LAKE KISSIMMEE
TIGER LAKE
DRAMA ISLAND
LAKE WALK-IN-THE-WATER
CROOKED LAKE
LAKE REEDY
LAKE ARBUCKLE
LAKE JOSEPHINE
WAVERLY
MOUNTAIN LAKE
LAKE WALES
TEMPLETON
HIGHLANDS PARK
ALTURAS
DAVENPORT
CONWAY
DUNDEE
EAGLE LAKE
DUFFUM
MIDLAND
FROSTPROOF
POLK CITY
SEBRING
PLACID
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R31E.
R32E
HIGHLANDS COUNTY

On December 2nd, 1942, the case came on for the taking of testimony pursuant to the Order of the Court dated October 2, 1942, and thereafter, on January 19, 1943, a transcript of the testimony taken at said hearing was filed being as follows:

(Copy of transcript of testimony by E. Marshall Stiefel consisting of 132 pages to be added here.)

ON JANUARY 26, 1943, THE COURT ENTERED HIS FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ISSUES RAISED BY THE AMENDED FIFTH DEFENSE. IN WORDS AND FIGURES AS FOLLOWS:

196 (Title Omitted.)

And now this day, this cause coming on to be heard, upon due notice upon the sufficiency of the Fifth Defense, as amended, on July 1st, 1942, and pursuant to testimony taken on December 2nd, 1942, by the Court, without jury, on the sufficiency of said defense, and the Court having heard the argument of counsel, and being fully advised in the premises;

The Court finds the facts with reference to said Fifth Defense, as amended, to be as follows:

I. During the two seasonal periods in controversy the defendant-corporation operated a commercial canning plant for the canning of agricultural commodities to-wit, citrus fruits. Said plant was located in the town of Davenport, Polk County, Florida.

II. The evidence discloses that throughout the said two seasonal periods of operation of the defendant's establish-

ment in controversy, the defendant employed at said establishment in its canning operations and processes from 40 to 50 "peelers" and from 175 to 200 "sectionizers", both of which types of workers were known as "piece-workers", and six inspectors or checkers and inspectors, and two floor-walkers, all of whom were known as "hour hands".

III. The said town of Davenport is a town of 650 population, according to the 15th United States Census, 1930. It is situated within four miles of an incorporated town known as Haines City, Polk County, Florida, which had a population according to both the 15th U. S. Census, 1930, and the 16th U. S. Census, 1940, of over 3,000 persons.

IV. The canning season in Florida runs from approximately November 1 of one year to June 1 of the following year, and, in the two seasons complained of, the defendant was engaged in canning fruits during the following periods: From November 14, 1938 to May 26, 1939 and from November 16, 1939 to March 30, 1940.

V. Section 13 (a) (10) of said Act provides as follows:

"13. The provisions of section (6) wages provisions) and 7 (hours provisions) shall not apply with respect to—(10) to any individual employed within the area of production (as defined by the Administrator) engaged in handling, packing—preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market.—"

VI. The Wage and Hour Administrator promulgated on October 20, 1938, Section 536.2 of the Regulations, purporting to define "area of production" as follows:

"Section 536.2 'Area Of Production' As Used In Section 13 (a) (10) of The Fair Labor Standards Act. 'an indi-

DEFT'S EXHIBIT G.

441 Civ.-T. Addison vs. Holly Hill Fruit Products. Filed in Evidence Dec. 2, 1942, Edwin R. Williams, Clerk.

Grapefruit Distributors, Incorporated.

Fruit Purchases for the 1939-1940 Citrus Season.

Date	Name	No. of Boxes	Location of Groves	Variety	Within 10 Mi. Boxes	Within 15 Mi. Boxes	Within 20 Mi. Boxes	Within 25 Mi. Boxes	Within 25 Mi. Boxes	Distance Unknown Boxes
11-16-39	E. Stone	49		Grapefruit						49
11-21-39	G. Stone	115		Grapefruit						115
11-22-39	B. C. Cook	4883	Haines City	Grapefruit	4883					
11-22-39	Lindsay & Hamric	193		Grapefruit						193
11-22-39	C. C. Spencer	313	Haines City	Grapefruit	313					
11-22-39	Perry Lloyd	125								125
12- 4-39	Tom Keegan	559	Dundee	Grapefruit	559					
12- 7-39	John Weatherford	292	Lucerne	Grapefruit	292					
12- 7-39	Ralph Smith	357	Dundee—Lake Hamilton	Grapefruit	357					
12- 8-39	Lewis Roberts	43	Davenport	Grapefruit	43					
12- 8-39	John Weatherford	133	Lucerne	Grapefruit	133					
12- 9-39	Lindsay & Hamric	327		Grapefruit						327
12-11-39	Tom Keegan	569	Dundee	Grapefruit	569					
12-11-39	Ralph Smith	123	Lake Hamilton	Grapefruit	123					
12-16-39	Lindsay & Hamric	167		Grapefruit						167
12-16-39	B. C. Cook	4418	Haines City	Grapefruit	4418					
12-29-39	B. C. Cook	324	Haines City	Grapefruit	324					
12-30-39	V. J. Martin	93	Davenport	Grapefruit	93					
12-16-39	John Weatherford	557	Florence Villa	Oranges		557				
12-14-39	John Weatherford	277	Florence Villa	Oranges		277				
1-13-40	J. A. Snively, Jr.	571	Haines City—Tower Lake	King Oranges	571					
1-15-40	V. J. Martin	69	Davenport	Grapefruit	69					
1-18-40	Bonita Fruit Sales Co.	336	Davenport	Grapefruit	336					
1-19-40	B. C. Cook	1529	Haines City	Grapefruit	1529					
1-26-40	W. V. Rewis	4	Davenport	King Oranges	4					
1-27-40	John Weatherford	949	Florence Villa	Oranges		949				
1-26-40	J. M. Crumbly	11	Davenport	Grapefruit	11					
1-26-40	J. M. Crumbly	28	Davenport	Grapefruit	28					

Grapefruit Distributors, Incorporated.

Fruit Purchases for the 1939-1940 Citrus Season.
Continued—Page 2.

Date	Name	No. of Boxes	Location of Groves	Variety	Within 10 Mi. Boxes	Within 15 Mi. Boxes	Within 20 Mi. Boxes	Within 25 Mi. Boxes	Over 25 Mi. Boxes	Distance Unknown Boxes
2-14-40	Mrs. H. Evanhouse	788	Haines City	Grapefruit	788					
2-14-40	J. E. Breadwell	962		Oranges						962
2-15-40	B. C. Cook	1811	Haines City	Grapefruit	1811					
2-15-40	S. Z. Fields	373		Grapefruit						373
2-15-40	John Reidenbaugh	555	Haines City	Grapefruit	555					
2-15-40	C. W. Rosenski	69	Lake Alfred	Oranges	69					
2-15-40	H. B. Mabson	184	Davenport	Oranges	184					
2-15-40	Gentile Bros.	693		Oranges						693
2-15-40	J. A. Langley	2275	Haines City, etc.	Grapefruit				2275		
2-17-40	D. C. Duke	221		Grapefruit						221
2-19-40	S. Z. Fields	120		Grapefruit						120
2-21-40	A. D. Wells	464		Grapefruit						464
2-22-40	Jim Edwards	758	Lake Hamilton	Grapefruit	758					
2-22-40	S. Z. Fields	257		Grapefruit						257
2-22-40	J. E. Breadwell	214		Grapefruit						214
2-22-40	J. E. Breadwell	396		Oranges						396
2-24-40	B. C. Cook	5445	Haines City	Grapefruit	5445					
2-24-40	H. J. McKeown	596	Davenport	Grapefruit	596					
2-24-40	John Weatherford	127	Lucerne	Grapefruit	127					
2-24-40	Richard McLean	29	Davenport	Grapefruit	29					
2-24-40	S. Z. Fields	624		Grapefruit						624
2-26-40	S. Z. Fields	395		Grapefruit						395
2-26-40	S. Z. Fields	129		Grapefruit						129
2-27-40	A. D. Wells	801		Grapefruit						801
2-28-40	H. H. Joiner	124		Grapefruit						124
2-29-40	A. I. Barker	656		Grapefruit						656
2-29-40	D. C. Duke	117		Grapefruit						117
3- 1-40	B. C. Cook	3902	Haines City	Grapefruit	3902					
2-29-40	S. Z. Fields	297		Grapefruit						297
3- 1-40	Highland Park Service	744	Lake Wales	Grapefruit				744		
3- 1-40	J. A. Langley	221	Haines City, etc.	Grapefruit				221		
3- 1-40	Lake Wales Citrus Growers Assn.	1631	Lake Wales	Grapefruit				1631		

Grapefruit Distributors, Incorporated.

Fruit Purchases for the 1939-1940 Citrus Season.

Continued—Page 3.

Date	Name	No. of Boxes	Location of Groves	Variety	Within 10 Mi. Boxes	Within 15 Mi. Boxes	Within 20 Mi. Boxes	Within 25 Mi. Boxes	Over 25 Mi. Boxes	Distance Unknown Boxes
3- 5-40	West Robinson Fruit Co.	122		Grapefruit						122
3- 6-40	D. C. Duke	107		Grapefruit						107
3- 6-40	A. I. Barker	140		Grapefruit						140
3- 9-40	B. C. Cook	3760	Haines City	Grapefruit	3760					
3- 9-40	S. Z. Fields	221		Grapefruit						221
3-11-40	A. D. Wells	119		Grapefruit						119
3-11-40	A. I. Barker	514		Grapefruit						514
3-14-40	A. I. Barker	1050		Grapefruit						1050
3-15-40	Roland Parker	212		Grapefruit						212
3-19-40	J. E. Breadwell	416		Grapefruit						416
3-19-40	J. E. Breadwell	78		Oranges						78
3-20-40	S. Z. Fields	251		Grapefruit						251
3-21-40	H. A. Monteith	114	Haines City—L. Hamilton	Oranges	114					
3-23-40	B. C. Cook	2132	Haines City	Grapefruit	2132					
3-23-40	Gateway Fruit Co.	134		Oranges						134
3-23-40	Ro-E-Gaines Fruit Co. Inc.	501	Clermont (South)	Oranges				501		
3-23-40	B. C. Cook	786	Haines City	Grapefruit	786					
3-25-40	H. A. Monteith	48	Haines City—L. Hamilton	Oranges	48					
3-27-40	H. A. Monteith	34	Lake Hamilton	Oranges	34					
3-30-40	J. E. Breadwell	376		Grapefruit						376
3-30-40	B. C. Cook	1894	Haines City	Grapefruit	1894					
4- 9-40	Charles Baker	329		Grapefruit						329
4-13-40	John Weatherford	724	Lucerne	Grapefruit	724					
4-13-40	B. C. Cook	470	Haines City	Grapefruit	470					
4-16-40	S. Z. Fields	126		Grapefruit						126
4-23-40	B. C. Cook	2053	Haines City	Grapefruit	2053					
4-27-40	Rooks & Zolkas	126	Haines City	Grapefruit	126					
4-29-40	B. C. Cook	5160	Haines City	Grapefruit	5160					
5-11-40	Rooks & Zolkas	2430	Haines City	Oranges	2430					
5-15-40	Rooks & Zolkas	621	Haines City	Oranges	621					
5-15-40	Cherokee Operating Co.	15251	Davenport	Oranges	15251					
5-15-40	C. H. Lindvall	106		Oranges						106
5-15-40	Harry Strohm	863	Davenport	Oranges	863					
5-15-40	V. J. Martin	3704	Davenport	Oranges	3704					
5-15-40	Gentile Bros.	1849		Oranges						1849

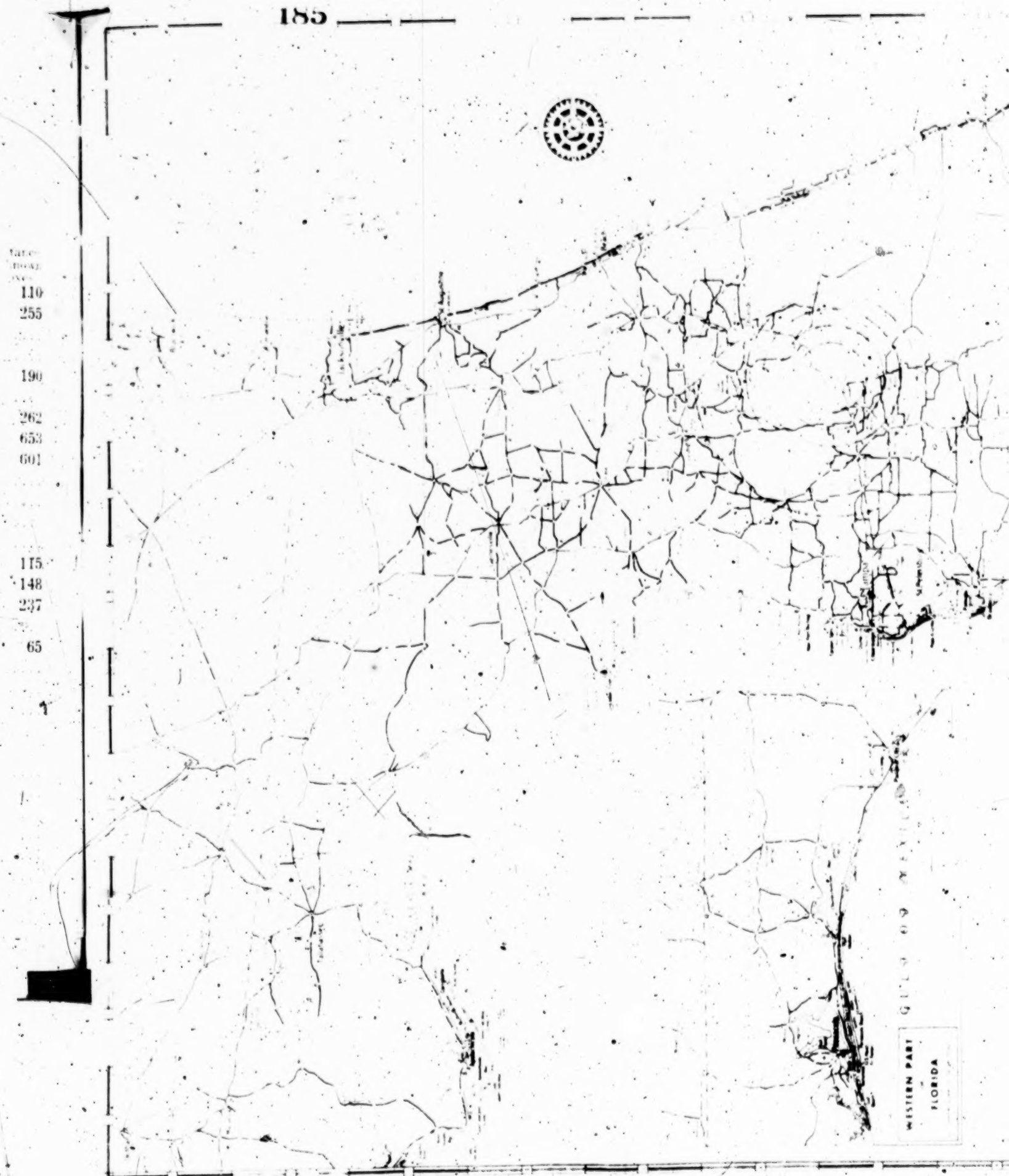
DEFT'S EXHIBIT H.

441 Civ.-T. Addison vs. Holly Hill Fruit Products. Filed in Evidence Dec. 2, 1942, Edwin R. Williams, Clerk.

Grapefruit Distributors, Incorporated.

Fruit Purchases for the 1938-1939 Citrus Season.

Date	Name	No. of Boxes	Location of Groves	Variety	Within 10 Mi. Boxes	Within 15 Mi. Boxes	Within 20 Mi. Boxes	Within 25 Mi. Boxes	Over 25 Mi. Boxes	Distance Unknown Boxes
11-16-38	J. D. Fox & Cox	110		Early Grapefruit						110
11-17-38	J. H. Langley	255		Early Grapefruit						255
11-17-38	B. C. Cook	2356	Haines City	Early Grapefruit	2356					
11-22-38	B. C. Cook	2868	Haines City	Early Grapefruit	2868					
11-22-38	J. D. Fox & Cox	190		Early Grapefruit						190
11-23-38	Clay Binion	2940	Lake Alfred	Early Grapefruit	2940					
11-23-38	J. D. Fox & Cox	262		Early Grapefruit						262
11-26-38	J. D. Fox & Cox	653		Early Grapefruit						653
11-30-38	J. D. Fox	601		Early Grapefruit						601
11-30-38	Alfred King	67	Loughman	Early Grapefruit	67					
11-30-38	Clay Binion	4752	Griffin	Early Grapefruit				4752		
11-30-38	Clay Binion	235	Lake Alfred	Early Grapefruit	235					
12- 1-38	B. C. Cook	1990	Haines City	Early Grapefruit	1990					
12- 1-38	J. D. Fox & Cox	115		Early Grapefruit						115
12- 1-38	J. D. Fox & Cox	148		Early Grapefruit						148
12- 5-38	J. D. Fox & Cox	237		Early Grapefruit						237
12- 5-38	R. M. Bielling	42	Lake Hamilton	Early Grapefruit	42					
12- 5-38	J. D. Fox	65		Early Grapefruit						65
12-12-38	Julius Matsen (Blue Map)	181	Lake Hamilton	Early Grapefruit	181					
12-12-38	C. R. Erwin Estate	5206	Lake Hamilton	Early Grapefruit	5206					
12-14-38	J. L. Cayson	186	Winter Haven—Eloise	Early Grapefruit		186				
12-15-38	C. E. Rubush	56	Lake Hamilton	Early Grapefruit	56					
12-15-38	C. J. Matsen	30	Lake Hamilton	Early Grapefruit	30					
12-16-38	N. A. Mixon	1998	Lake Hamilton	Early Grapefruit	1998					
12-19-38	C. R. Erwin Estate	4868	Lake Hamilton	Early Grapefruit	4868					
12-23-38	Clay Binion	1146	Lake Alfred	Early Grapefruit	1146					
12-30-38	N. A. Mixon & Cox	945	Lake Hamilton	Early Grapefruit	945					
1-12-39	B. C. Cook	935	Haines City	Grapefruit	935					
1-20-39	A. M. Tilden	346	Haines City—Tower Lake	King Oranges	346					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vidual shall be regarded as employed in the 'area of production' within the meaning of section 13 (a) (10), in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products,

(a) if he is engaged in such work on a farm and on agricultural or horticultural commodities produced exclusively on such farm, or

(b) if the agricultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediate locality and the number of employees in such establishment does not exceed seven.

That regulation remained in effect through April, 1939, when following a series of Administrative hearings, he promulgated, effective April 30, 1939, an additional paragraph to said Regulation 536.2, as follows:

"(e) with respect to perishable or seasonable, fresh fruits and vegetables, if he is engaged in handling, packing, storing, drying, preparing in their raw or natural state, or canning such products for market in an establishment which is located in the open country or in a rural community and which obtains all of its products from farms in its immediate locality. As used in this subsection (e) 'open country' or 'rural community' shall not include any city or town of 2,500 or greater population according to the 15th United States Census, 1930, and 'immediate locality' shall not include any distance of more than 10 miles."

On June 15, 1939, effective June 17, 1939, the Administrator again amended said Regulation, as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10), in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(a) if he performs these operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven, or

• • •

(d) if he performs those operations on materials all of which come from farms in the immediate locality of the establishment where he is employed and the establishment is located in the open country or in a rural community. As used in this sub-section (d), 'immediate locality' shall not include any distance of more than ten miles and 'open country' or 'rural community' shall not include any city or town of 2,500 or greater population according to the 15th United States Census, 1940."

On July 23, 1940, effective October 1, 1940, the Administrator again amended said Regulation as follows:

"II. An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10), in handling, packing, storing, drying, preparing in their raw or natural state, or canning of perishable or seasonable fresh fruits or vegetables for market.

if he performs those operations on materials all of which come from farms in the general vicinity of the

establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten."

On March 12, 1941, effective April 1, 1941, the Administrator again amended said Regulation as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(a) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten, or

(b) with respect to dry edible beans, if he is engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this sub-section (b), 'first concentration pint' means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment normally receiving a portion of the beans assembled or from other first concentration points, or

(c) with respect to Puerto Rican leaf tobacco, if he is engaged in handling, packing, storing, and drying such tobacco for market in an establishment which is a first concentration point for such tobacco. As used in this subsection (c), 'first concentration point' means a place where

such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing."

On October 6, 1941, effective January 5, 1942, the Administrator again amended said Regulation, as it is now currently in effect, as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products;

(a) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where it is employed and the number of employees engaged in those operations in that establishment does not exceed ten, or

(b) with respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this subsection (b), 'first concentration point', means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment normally receiving a portion of the beans assembled from other first concentration, or

(c) with respect to Puerto Rican leaf tobacco, if he is engaged in piling, bulking, or otherwise handling unstripped tobacco for market in an establishment which is

Fruit Purchases for the 1939-1940 Citrus Season.

Date	Name	No. of Boxes	Location of Groves	Variety	Within 10 Mi. Boxes	Within 15 Mi. Boxes	Within 20 Mi. Boxes	Within 25 Mi. Boxes	Within 25 Mi. Boxes	Distance Unknown Boxes
11-16-39	E. Stone	49		Grapefruit						49
11-21-39	G. Stone	115		Grapefruit						115
11-22-39	B. C. Cook	4883	Haines City	Grapefruit	4883					
11-22-39	Lindsay & Hamric	193		Grapefruit						193
11-22-39	C. C. Spencer	313	Haines City	Grapefruit	313					
11-22-39	Perry Lloyd	125								125
12- 4-39	Tom Keegan	559	Dundee	Grapefruit	559					
12- 7-39	John Weatherford	292	Lucerne	Grapefruit	292					
12- 7-39	Ralph Smith	357	Dundee—Lake Hamilton	Grapefruit	357					
12- 8-39	Lewis Roberts	43	Davenport	Grapefruit	43					
12- 8-39	John Weatherford	133	Lucerne	Grapefruit	133					
12- 9-39	Lindsay & Hamric	327		Grapefruit						327
12-11-39	Tom Keegan	569	Dundee	Grapefruit	569					
12-11-39	Ralph Smith	123	Lake Hamilton	Grapefruit	123					
12-16-39	Lindsay & Hamric	167		Grapefruit						167
12-16-39	B. C. Cook	4418	Haines City	Grapefruit	4418					
12-29-39	B. C. Cook	324	Haines City	Grapefruit	324					
12-30-39	V. J. Martin	93	Davenport	Grapefruit	93					
12-16-39	John Weatherford	557	Florence Villa	Oranges		557				
12-14-39	John Weatherford	277	Florence Villa	Oranges		277				
1-13-40	J. A. Snively, Jr.	571	Haines City—Tower Lake	King Oranges	571					
1-15-40	V. J. Martin	69	Davenport	Grapefruit	69					
1-18-40	Bonita Fruit Sales Co.	336	Davenport	Grapefruit	336					
1-19-40	B. C. Cook	1529	Haines City	Grapefruit	1529					
1-26-40	W. V. Rewis	4	Davenport	King Oranges	4					
1-27-40	John Weatherford	949	Florence Villa	Oranges		949				
1-26-40	J. M. Crumbly	11	Davenport	Grapefruit	11					
1-26-40	J. M. Crumbly	28	Davenport	Grapefruit	28					
1-29-40	Holly Hill Fruit Products, Inc.	911	Davenport (L. Jacobs)	Oranges	911					
2- 7-40	B. C. Cook	1867	Haines City	Grapefruit	1867					
2- 7-40	L. L. Jacobs, Inc.	273	Davenport	Oranges	273					
2- 7-40	Haines City Citrus Growers Assn.	142	Haines City	Grapefruit	142					
2- 7-40	Gentile Bros.	199		Oranges						199
2- 7-40	Gateway Fruit Co.	315		Oranges						315
2- 8-40	Mrs. A. Warren	1559	Haines City	Grapefruit	1559					
2- 8-40	Mrs. T. J. McKnight	54	Davenport	Grapefruit	54					
2-12-40	J. D. Cox	571		Grapefruit						571
2-12-40	Lake Wales Citrus Growers Assn.	6041	Lake Wales	Grapefruit				6041		
2-12-40	S. Z. Fields	269		Grapefruit						269
2-14-40	John Weatherford	82	Lucerne	Grapefruit	82					
2-14-40	Paul Swanson	1437	Lake Hamilton	Grapefruit	1437					
2-14-40	John Weatherford	622	Florence Villa	Oranges		622				

Fruit Purchases for the 1939-1940 Citrus Season.

Continued—Page 2.

Date	Name	No. of Boxes	Location of Groves	Variety	Within 10 Mi. Boxes	Within 15 Mi. Boxes	Within 20 Mi. Boxes	Within 25 Mi. Boxes	Over 25 Mi. Boxes	Distance Unknown Boxes
2-14-40	Mrs. H. Evanhouse	788	Haines City	Grapefruit	788					
2-14-40	J. E. Breadwell	962		Oranges						962
2-15-40	B. C. Cook	1811	Haines City	Grapefruit	1811					
2-15-40	S. Z. Fields	373		Grapefruit						373
2-15-40	John Reidenbaugh	555	Haines City	Grapefruit	555					
2-15-40	C. W. Rosenski	69	Lake Alfred	Oranges	69					
2-15-40	H. B. Mabson	184	Davenport	Oranges	184					
2-15-40	Gentile Bros.	693		Oranges						693
2-15-40	J. A. Langley	2275	Haines City, etc.	Grapefruit				2275		
2-17-40	D. C. Duke	221		Grapefruit						221
2-19-40	S. Z. Fields	120		Grapefruit						120
2-21-40	A. D. Wells	464		Grapefruit						464
2-22-40	Jim Edwards	758	Lake Hamilton	Grapefruit	758					
2-22-40	S. Z. Fields	257		Grapefruit						257
2-22-40	J. E. Breadwell	214		Grapefruit						214
2-22-40	J. E. Breadwell	396		Oranges						396
2-24-40	B. C. Cook	5445	Haines City	Grapefruit	5445					
2-24-40	H. J. McKeown	596	Davenport	Grapefruit	596					
2-24-40	John Weatherford	127	Lucerne	Grapefruit	127					
2-24-40	Richard McLean	29	Davenport	Grapefruit	29					
2-24-40	S. Z. Fields	624		Grapefruit						624
2-26-40	S. Z. Fields	395		Grapefruit						395
2-26-40	S. Z. Fields	129		Grapefruit						129
2-27-40	A. D. Wells	801		Grapefruit						801
2-28-40	H. H. Joiner	124		Grapefruit						124
2-29-40	A. I. Barker	656		Grapefruit						656
2-29-40	D. C. Duke	117		Grapefruit						117
3- 1-40	B. C. Cook	3902	Haines City	Grapefruit	3902					
2-29-40	S. Z. Fields	297		Grapefruit						297
3- 1-40	Highland Park Service	744	Lake Wales	Grapefruit				744		
3- 1-40	J. A. Langley	221	Haines City, etc.	Grapefruit				221		
3- 1-40	Lake Wales Citrus Growers Assn.	1631	Lake Wales	Grapefruit				1631		
3- 1-40	J. E. Breadwell	1141		Grapefruit						1141
3- 1-40	J. E. Breadwell	217		Oranges						217
3- 1-40	Gentile Bros.	734		Oranges						734
3- 1-40	D. C. Duke	102		Grapefruit						102
3- 1-40	S. W. Speer	112		Grapefruit						112
3- 1-40	A. I. Barker	131		Grapefruit						131
3- 1-40	John Weatherford	145	Florence Villa	Oranges		145				
3- 1-40	N. H. Stiles	132	Haines City	Grapefruit	132					
3- 1-40	H. B. Mabson	200	Davenport	Oranges	200					
3- 1-40	West Robinson Fruit Co.	235		Grapefruit						235

Fruit Purchases for the 1939-1940 Citrus Season.

Continued—Page 3.

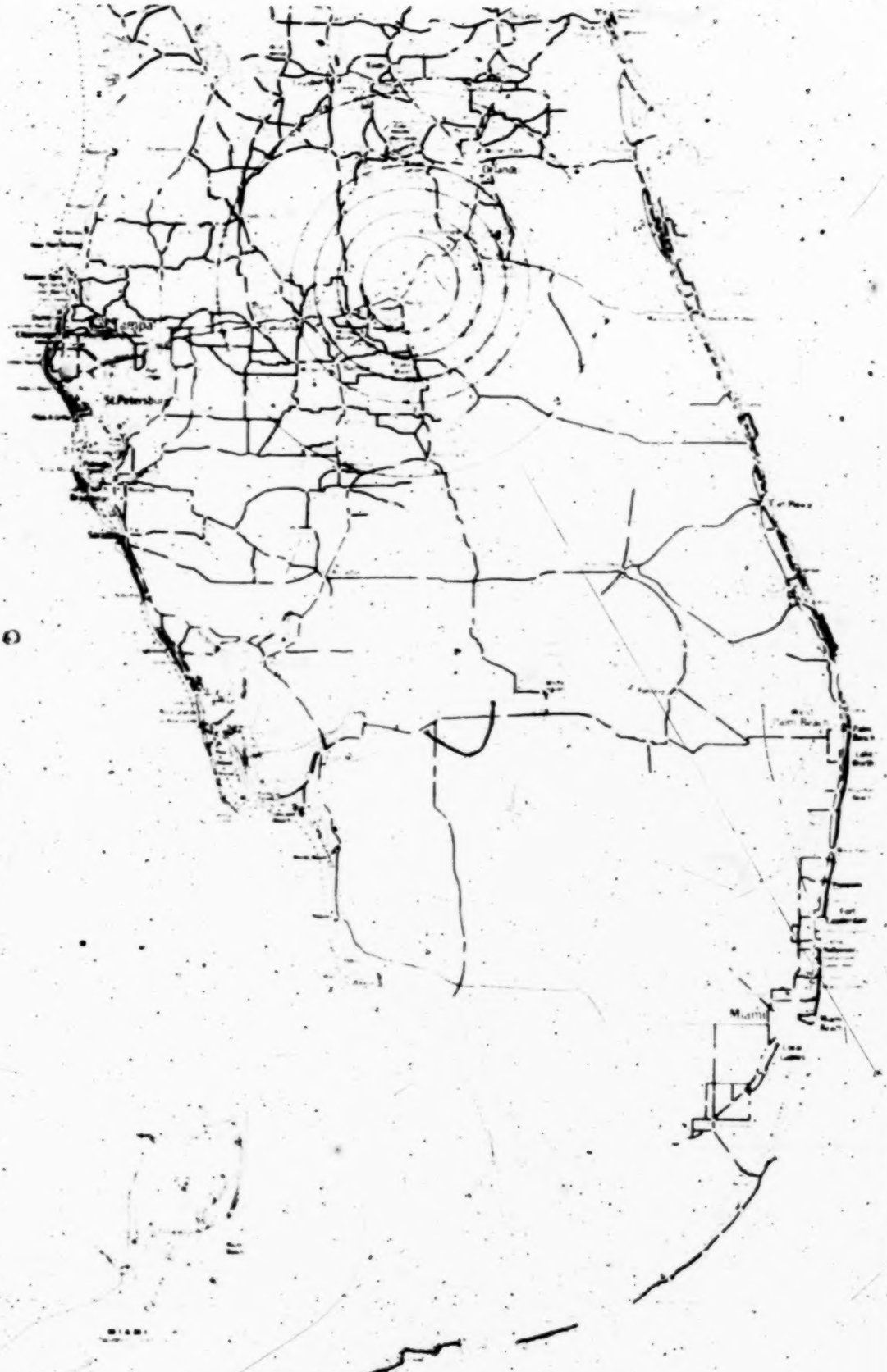
Date	Name	No. of Boxes	Location of Groves	Variety	Within 10 Mi. Boxes	Within 15 Mi. Boxes	Within 20 Mi. Boxes	Within 25 Mi. Boxes	Over 25 Mi. Boxes	Distance Unknown Boxes
3- 5-40	West Robinson Fruit Co.	122		Grapefruit						122
3- 6-40	D. C. Duke	107		Grapefruit						107
3- 6-40	A. I. Barker	140		Grapefruit						140
3- 9-40	B. C. Cook	3760	Haines City	Grapefruit	3760					
3- 9-40	S. Z. Fields	221		Grapefruit						221
3-11-40	A. D. Wells	119		Grapefruit						119
3-11-40	A. I. Barker	514		Grapefruit						514
3-14-40	A. I. Barker	1050		Grapefruit						1050
3-15-40	Roland Parker	212		Grapefruit						212
3-19-40	J. E. Breadwell	416		Grapefruit						416
3-19-40	J. E. Breadwell	78		Oranges						78
3-20-40	S. Z. Fields	251		Grapefruit						251
3-21-40	H. A. Monteith	114	Haines City—L. Hamilton	Oranges	114					
3-23-40	B. C. Cook	2132	Haines City	Grapefruit	2132					
3-23-40	Gateway Fruit Co.	134		Oranges						134
3-23-40	Ro-E-Gaines Fruit Co. Inc.	501	Clermont (South)	Oranges				501		
3-23-40	B. C. Cook	786	Haines City	Grapefruit	786					
3-25-40	H. A. Monteith	48	Haines City—L. Hamilton	Oranges	48					
3-27-40	H. A. Monteith	34	Lake Hamilton	Oranges	34					
3-30-40	J. E. Breadwell	376		Grapefruit						376
3-30-40	B. C. Cook	1894	Haines City	Grapefruit	1894					
4- 9-40	Charles Baker	329		Grapefruit						329
4-13-40	John Weatherford	724	Lucerne	Grapefruit	724					
4-13-40	B. C. Cook	470	Haines City	Grapefruit	470					
4-16-40	S. Z. Fields	126		Grapefruit						126
4-23-40	B. C. Cook	2053	Haines City	Grapefruit	2053					
4-27-40	Rooks & Zolkas	126	Haines City	Grapefruit	126					
4-29-40	B. C. Cook	5160	Haines City	Grapefruit	5160					
5-11-40	Rooks & Zolkas	2430	Haines City	Oranges	2430					
5-15-40	Rooks & Zolkas	621	Haines City	Oranges	621					
5-15-40	Cherokee Operating Co.	15251	Davenport	Oranges	15251					
5-15-40	C. H. Lindvall	106		Oranges						106
5-15-40	Harry Strohm	863	Davenport	Oranges	863					
5-15-40	V. J. Martin	3704	Davenport	Oranges	3704					
5-15-40	Gentile Bros.	1849		Oranges						1849
	Total	107704			75746	2550		11413		17995
	Dumps	108								
	Holly Hill Records	107596								

11-30-38	Clay Binion	[illegible]	[illegible]	Early Grapefruit	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
11-30-38	Clay Binion	235	Lake Alfred	Early Grapefruit	235						
12- 1-38	B. C. Cook	1990	Haines City	Early Grapefruit	1990						
12- 1-38	J. D. Fox & Cox	115		Early Grapefruit							115
12- 1-38	J. D. Fox & Cox	148		Early Grapefruit							148
12- 5-38	J. D. Fox & Cox	237		Early Grapefruit							237
12- 5-38	R. M. Bielling	42	Lake Hamilton	Early Grapefruit	42						
12- 5-38	J. D. Fox	65		Early Grapefruit							65
12-12-38	Julius Matsen (Blue Map)	181	Lake Hamilton	Early Grapefruit	181						
12-12-38	C. R. Erwin Estate	5206	Lake Hamilton	Early Grapefruit	5206						
12-14-38	J. L. Cayson	186	Winter Haven—Eloise	Early Grapefruit		186					
12-15-38	C. E. Rubush	56	Lake Hamilton	Early Grapefruit	56						
12-15-38	C. J. Matsen	30	Lake Hamilton	Early Grapefruit	30						
12-16-38	N. A. Mixon	1998	Lake Hamilton	Early Grapefruit	1998						
12-19-38	C. R. Erwin Estate	4868	Lake Hamilton	Early Grapefruit	4868						
12-23-38	Clay Binion	1146	Lake Alfred	Early Grapefruit	1146						
12-30-38	N. A. Mixon & Cox	945	Lake Hamilton	Early Grapefruit	945						
1-12-39	B. C. Cook	935	Haines City	Grapefruit	935						
1-20-39	A. M. Tilden	346	Haines City—Tower Lake	King Oranges	346						
1-23-39	C. D. Hedrick	78	Loughman	Early Grapefruit	78						
1-23-39	H. B. Mabson	76	Loughman	Early Grapefruit	76						
2-21-39	C. A. Stewart & Co.	1119	Florence Villa	Valencia Oranges		1119					
2-21-39	Holly Hill Coop. Citrus Assn.	11	Davenport	Pineapple Oranges	11						
2-31-39	W. A. Stanford	200	Lake Alfred	Pineapple Oranges	200						
2-37-39	C. A. Stewart & Co.	230	Lake Alfred & F. Villa	Valencia Oranges	68	162					
3- 6-39	J. L. Clark	54		Valencia Oranges							54
3-11-39	J. L. Clark	127		Valencia Oranges							127
3-11-39	L. R. Crews	251		Valencia Oranges							251
3-17-39	A. I. Mansfield	132	Lakeland	Oranges				132			
4- 4-39	Holly Hill Coop. Citrus Assn.	103	Davenport	Valencia Oranges	103						
4- 4-39	International Fruit Corp.	126	Lucerne	Pineapple Oranges	126						
4- 4-39	Chester C. Fosgate Co.	177	Davenport	Pineapple Oranges	177						
4-27-39	B. C. Cook	5429	Haines City	Early Grapefruit	5429						
5- 4-39	B. C. Cook	1572	Haines City	Early Grapefruit	1572						
5- 4-39	Tom Keegan	261	Dundee	Early Grapefruit	261						
5- 8-39	John Avery	1093	Lake Hamilton	Early Grapefruit	1093						
4- 8-39	C. R. Erwin Estate	6404	Lake Hamilton	Early Grapefruit	6404						
5- 8-39	Jesse Roberts	823	Haines City	Early Grapefruit	823						
5- 8-39	Peter Jordan	4104	Davenport	Early Grapefruit	4104						
6- 1-39	W. G. Colvin	86	Davenport	Early Grapefruit	86						
6- 1-39	John H. Avery	422	Lake Hamilton	Early Grapefruit	422						
6-24-39	B. C. Cook	125	Haines City	Early Grapefruit	125						
3-30-39	B. C. Cook	3532	Haines City	Early Grapefruit	3532						
	Total	60318			50899	1467		4884		3068	
	Dumps, Rots, etc.	633									
	Net Total	59685									

GULF OF MEXICO

1935
STANDARD OIL
Road Map
FLORIDA
STANDARD OIL COMPANY

Legend



a first concentration point for such tobacco; provided that employees engaged in stripping tobacco or engaged in piling, bulking, or otherwise handling stripped tobacco shall not be deemed to fall within this definition. As used in this subsection (c), 'first concentration point' means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing.

VII. In and throughout the said two seasonal periods of operation, the establishment of the defendant did not obtain all of its agricultural and horticultural commodities or materials from farms in the "immediate locality" or "general vicinity" of the said establishment as defined by the Administrator. An appreciable portion thereof came from a distance beyond the range of usual farm travel. The general vicinity of defendant's establishment was not sparsely settled, there being several towns and communities within a radius of less than ten miles. Thus, considerable fruit was canned and processed in the defendant's establishment during said season which came from the neighborhood of Haines City, which is within four miles and has several commercial canning plants operating in competition to defendant's establishment. Also considerable fruit was canned and processed in the defendant's establishment during the seasons in controversy, coming from the neighborhood of communities as far away from Davenport as Lake Wales—20 miles—Babson Park, several miles more than 20, Dundee 14 miles, Loughman 7 or 8 miles. Much of this fruit was hauled past other canning factories to reach the defendant's establishment.

VIII. In and during said two seasonal periods of operation, the establishment of the defendant is not located

in the "open country" or a "rural community", as defined by the Administrator in his said several definitions, because there was within the range of usual farm travel, at a point not more than four miles away, a town of more than 2500 population according to the applicable United States Census.

IX. There was practically no testimony showing the percentage of the fruit processed by the defendant establishment which was procured from groves located at a distance of more than ten miles by the shortest road haul from the establishment; almost all of the testimony on the distance of the point of origin of the commodities processed by said establishment during said two seasonal periods had reference to a ten mile radius, "as the crow flies".

X. The evidence discloses that the defendant is not an establishment operated by the farmers raising the commodities processed, and that the processing is not done by the farmers through the use of their own farm labor on their own farms. On the contrary, although its membership consisted of fruit growers owning groves in two certain townships in Polk County, Florida, the defendant accepted a considerable portion of its commodities from groves of non-members and, in fact, processed many thousands of boxes of fruit delivered to the canning plant by a speculative non-member, the Grapefruit Distributors, Inc., a corporation. The employees of the defendant were not hired by the members, nor were they farm labor. On the contrary, they were hired by the defendant corporation and did no farm or agricultural labor. They were simply industrial employees. The defendant corporation was not itself engaged in agricultural or horticultural labor or work. It was a commercial industrial concern entitled to earn a reasonable profit from canning fruit.

Conclusions of Law.

The Court concludes as matters of law as follows:

A. If the several applicable definitions of the phrase "area of production" as made by the Administrator, are void, as claimed in the Fifth Defense, as amended, then the defendant is not entitled to the total exemption given by Section 13 (a) (10) of the Fair Labor Standards Act of 1938, because, as stated in the case of: Redlands Foothill Groves v. Jacobs (1940, U. S. Dist. Ct. Cal.) 30 Fed. Supp. 995, at 1006, where Congress says that the Administrator is to define the "area of production" if the Administrator's definition is wrong, the defendant cannot claim exemption until the Administrator re-defines the phrase so as to exclude his establishment. The Courts cannot define the phrase "area of production" for the Administrator. Moreover, this is not a case such as the case of Fleming v. Farmers Peanut Co. (C. C. A. 5th) 128 Fed. (2nd) 404 where prospective relief in the nature of a discretionary injunction is asked. Either the plaintiffs are entitled to the damages they ask or they are not, and they cannot be deprived of a recovery by allowing a total exemption to the defendant if same did not exist when the plaintiffs' rights of action accrued.

B. If, on the other hand, said several definitions by the Administrator are valid, then the Court finds that under the Fifth Defense as amended and as pleaded and proved, the defendant has not proved itself entitled to the total exemption claimed under Section 13 (a) (10) of the Fair Labor Standards Act of 1938, in, for, or during any of the periods involved in this controversy.

C. Having in view the fact that the purpose of the Fair Labor Standards Act of 1938, as disclosed by the

debates in Congress on the passage of the Act was to raise sub-standard labor conditions in industrial plants, the Court is of the opinion that as applied to defendant's establishment each of the Administrator's several definitions of the phrase "area of production" is a valid definition.

D. In allowing the total exemption given by Section 13 (a) (10) of said Act, the intent of Congress, as disclosed by the debates in Congress on the passage of the Act to exempt the farmer in canning or "first process" operations done on his own farm, or in his own neighborhood, through his own farm labor, because, at the time of the passage of the Act, the farmer could not afford to pay his farm labor the wages paid in industry and, further, farm labor received some of its compensation in board and "keep". Each component element of each of the Administrator's definitions of "area of production", namely, the restriction of the number of employees, the provision that the commodities or materials are to be obtained by the establishment from the "immediate vicinity" or "general vicinity" of the establishment, and the provision that the establishment must be located in the "open country," or a "rural community" as defined by the Administrator is properly a part of a definition drawn to exempt farm labor but not industrial labor. Certainly, since the main purpose of the Act was to raise sub-standard labor conditions in industry, the purpose of said total exemption given by Section 13 (a) (10) could not have been to exempt commercial industrial establishments, such as defendants' canning plant, which accepted commodities from such non-members as Grapefruit Distributors, Inc. and which employed a great many industrial employees hired by the defendant corporation and not by its members individually.

E. It is true that since this suit was filed the appeal in the case of Fleming Administrator versus Farmers Peanut Company (37 Fed. Supple. 628) has been decided by our Fifth Circuit Court of Appeals, 128 Fed. 2nd 104. This Court has given due consideration to this decision. It is true that the opinion in that case rejects the number element of the Administrator's definitions as not a true execution of the power given to define, but the factual circumstances of the Farmers Peanut case as disclosed in the District Court opinion are so different from these existing in this present case that the undersigned Judge hesitates to believe that the said Circuit Court of Appeals was intending, by its opinion in the Farmers Peanut case, to create a precedent that would exempt such industrial establishments as the defendant's canning plant.

F. The Court concludes, as a conclusion of law that the haulage provision of the Administrator's several definitions defining "immediate locality" as "not including any distance of more than ten miles" means "more than ten miles" by the shortest available road route, but not a radius distance "as the crow flies" from the plant.

G. The Court concludes that the terms "open country" and "rural community" which are defined by the Administrator as not including any city or town of 2,500 or greater population, according to the 15th United States Census, 1930, or the 16th United States Census, 1940, would exclude the town of Davenport, since a town of more than 2,500 such as Haines City, is located within the "immediate locality" or "general vicinity" of the establishment.

H. The Fifth Defense, as amended, necessarily admits, because it does not deny, that the employees employed by the defendant's establishment were employed during

the periods in controversy at less than the legal minimum wages fixed by Section 6 of the Act, and were not paid time and a half overtime as required by Section 7 (a) of the Act. Therefore, the defendant's establishment was, during said periods, being operated under the sub-standard labor conditions, which it is the purpose of said Act to remedy. With these admissions in view, the total exemption which the Congress intended by Section 13 (a) (10) to give farmers employing their own farm labor on their own farms or in neighborhood establishments is not properly applicable to the defendant's establishment.

I. The Court is of the opinion that, where an industrial canning establishment is, as here, engaged in handling commodities for non-members, in direct competition with other competing industrial canning establishments, engaged in the same type of canning business, and located within the "immediate locality" and "general vicinity" of the defendant's establishment as defined by the Administrator, it is not within the idea of a canning plant located on and used for an individual farm, or of a farmers' neighborhood establishment, operated by the farmers themselves with their own farm labor for the purpose of canning commodities or materials grown on farms in the immediate locality or general vicinity of the canning or processing establishment such as the Court conceives was intended to be exempted by Section 13 (a) (10) of the Act and by the several definitions of the said exemption promulgated by the Administrator. Such a total exemption was not intended to permit such commercial industrial establishments as defendant's to maintain sub-standard labor conditions in violation of the main purpose of the Fair Labor Standards Act of 1938, while requiring all others like commercial industrial establishments to comply with the Act.

Conclusion.

On the basis of the above findings of fact, and the above conclusions of law, the Court will enter an appropriate judgment, striking the said Fifth Defense, as amended.

This the 26th day of January, A. D. 1943.

WILLIAM J. BARKER,
U. S. District Judge.

On January 26, 1943, the Court likewise entered his ORDER ON PLEADINGS in the words and figures as follows:

208 (Title Omitted.)

And now this day this cause coming on to be heard upon due notice, upon the sufficiency of the Fifth Defense as amended, after the taking of testimony on December 2, 1942, as to the said defense and the Court having heard the argument of counsel for the respective parties and being fully advised in the premises, and having rendered his findings of fact and conclusions of law with regard to the sufficiency of the said Fifth Defense as amended and having concluded that said Fifth Defense as amended is insufficient in point of law as well as in fact;

It Is Considered by the Court that said Fifth Defense as amended be and it is hereby stricken pursuant to the motion filed by the plaintiffs addressed thereto.

And Thereupon, counsel for the plaintiffs having applied to the Court to enter a ruling on the plaintiffs' motion to strike the Third and Fourth Defenses of the answer, which ruling the Court reserved in its order of the 11th of

June, A. D. 1942, and the defendant tendering and being permitted to file an amended Fourth Defense and agreeing that plaintiffs' said motion to strike be applied to said amended Fourth Defense, thereupon the Court finds, as a matter of law, as follows:

(a) The Third Defense is one setting up a claim of exemption of 14 work weeks in the aggregate in a calendar year under Section 7-b-3 of the Fair Labor Standards Act of 1938. And the Fourth Defense is one setting up a claim of exemption during a period or periods of not more than 14 weeks in the aggregate in any calendar year under Section 7-c of said Act.

(b) The Court finds that Section 7-h-3 merely relates to exemption from paying compensation for overtime employment and that in order for the defendant to be entitled to a claim of exemption under said Section 7-b-3, the industry must have been found by the Adminstrator to be of a seasonal nature. The Court further finds that the Administrator did not find the citrus industry to be of a seasonal nature until August 24, 1940, which was a date subsequent to all dates and periods in controversy here, (see Federal Register of August 24, 1940).

(c) With further reference to said exemption as set forth in the Third Defense of the original answer filed by the defendant under Section 7-b-3, the Court is of the opinion that said exemption did not exist until such finding by the Administrator and that the finding could not be retroactive. Consequently the right of the defendant to claim this exemption under Section 7-b-3 is disproved by the Third Defense in which said claim is made.

(d) The Court finds that this exemption (Section 7-b-3) is only available to the defendant if the defendant

has paid its employees compensation at the rate of not less than time and a half the regular rate at which they were employed for a period or periods of more than 12 hours in any work day and not less than 56 hours in any work week and the Third Defense does not set up that the employer, namely, the defendant herein, has complied with this condition of the said partial exemption claimed.

(e) Therefore, the Court finds that the Third Defense which claims a partial exemption of 14 weeks under Section 7-b-3 of the said Act is insufficient in point of law.

(f) With reference to the amended Fourth Defense which claims a 14 week partial exemption under Section 7-c of the said Act, the Court finds that this applies to a period or periods of not less than 14 work weeks in the aggregate in any calendar year in the canning of perishable or seasonal fresh fruits and vegetables or in the first processing within the "area of production" as defined by the Administrator of any agricultural or horticultural commodities during the season's operations. It does not appear from the Fourth Defense that the defendant at any time prior to the institution of this suit designated any period or periods of not more than 14 weeks in the aggregate in any calendar year involved in the controversy. In fact, the Fourth Defense does not deny, and, therefore, admits the charges of the complaint as amended that the defendant violated the minimum wage and maximum hour provisions of the Fair Labor Standards Act of 1938, apparently relying upon a claim of total exemption under Section 13 (a) (10). Any claim to said partial exemption allowed by Section 7-c is inconsistent with a claim of total exemption under Section 13 (a) (10), such as is pleaded in the amended Fifth Defense. Moreover, since employment is a matter of contract, it is reasonable to construe

the designation of the particular fourteen work-weeks to be exempted to be a matter for agreement between the employer and the employee, and the Fourth Defense does not aver any such joint designation. Moreover, the employer may elect to claim the partial exemption allowed by Section 7-c where applicable and where the employer, as here, appears to have settled with the plaintiff for the weeks worked during the two seasons in controversy, without claiming the partial exemption under Section 7-c, it is not now entitled to re-open the account and claim same now.

Therefore, the Court finds that the defendant is not entitled to the partial exemption claimed in the Fourth Defense on account of its canning operations or on account of the first proceeding within the area of production as defined by the Administrator.

Thereupon, it is considered by the Court that:

A. The said Third and amended Fourth Defenses being each of them severally insufficient in point of law, the motion of the plaintiffs to strike the said third and fourth defenses is severally granted.

B. The First Defense being by way of demurrer to the complaint as finally amended and the Court having held that the complaint as finally amended to be good in point of law, the cause will now proceed upon the taking of testimony on the issues raised by the Second Defense as amended on July 1, 1942.

Done and Ordered at Orlando, Florida, on this the 26th day of January, A. D. 1943.

W. J. BARKER,
District Judge.

On February 15, 1943, plaintiffs filed MOTION FOR SUMMARY JUDGMENT UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE in words and figures as follows:

212 (Title Omitted.)

Come now the plaintiffs in the above styled cause, and show unto this Honorable Court that except as to the amount of damages there is no genuine issue as to any material fact and that moving parties are entitled to a judgment as a matter of law, and further show unto this Honorable Court that there is no merit whatever in truth and in fact in the Second Defense filed by the Defendant-Company herein and that none of the denials in said Second Defense of any of the averments of the amended complaint as finally amended are in point of fact true and that said defense is a sham defense. Thereupon, Plaintiffs move this Court under Rule 56 of the Federal Rules of Civil Procedure for a summary judgment against the defendant-Company on said Second Defense.

The foregoing Motion for Summary Judgment was at the pre-trial conference amended to apply only to the plaintiffs named in the final judgment in this case.

On February 24, 1943, the defendant filed a PETITION FOR REHEARING in words and figures as follows:

213 (Title Omitted.)

Comes now the defendant, by its undersigned attorneys, and moves the Court for a rehearing and reargument on the order entered by this Court on January 26, 1943, and the findings of fact and law on which said order was based, on the following grounds:

1. The findings of fact are not warranted by the testimony adduced on the issue raised by the amended Fifth Defense on the following, among other points:

(a) The testimony shows conclusively that the defendant obtained his agricultural and horticultural commodities from farms in the immediate locality or general vicinity of the said establishment as defined by the Administrator during the period or periods of time in which the several definitions were applicable.

(b) An appreciable portion of the agricultural and horticultural commodities did not come from a distance beyond the range of usual farm travel.

(c) The third paragraph of the amended Fifth Defense filed by this defendant was admitted by counsel for the plaintiffs and the findings of fact are inconsistent with said third paragraph.

(d) The third paragraph of the Fifth Defense admitted to be true, among other things alleged,

"The result of this integrated development of citrus is that the usual range of farm travel is great, many producers owning grove properties more than 100 miles distant, but belonging to a cooperative or customarily dealing with a single independent handler in proximity to one of such grove properties, and producers and handlers alike are competitors and neighbors, meeting in common markets and under common conditions to bid against one another for a single labor supply or a single price or to exchange solutions of their common problems though their groves or their establishment may be more than 100 miles apart",

and the testimony shows none of the agricultural or horticultural commodities were obtained from as far as a distance of 100 miles and, yet the Court made a finding that "an appreciable portion thereof came from a distance beyond the range of farm travel".

(e) The Court finds that the establishment of the defendant is not located in the "open country" or "rural community" for the reason that there is within a distance of four miles a town of 2500 population which is an improper manner of determining whether an establishment is located in an open country or a rural community.

(f) The Court erred in determining the haul of fruit by holding that the criterion should be "road miles" instead of "as the crow flies".

(g) The Court erred in determining whether the defendant was within the "area of production" dependent upon whether or not the services performed by the plaintiff were "farm labor" which is covered by another section of the Fair Labor Standards Act and has no bearing whatsoever on the issue raised by the Fifth Defense.

(h) The Court erred in finding "it is a commercial industrial concern entitled to earn a reasonable profit from canned fruit" because the evidence clearly shows the same to be a cooperative organized and existing under the laws of Florida applicable to cooperatives.

2. The Court erred in the conclusions of law in the following, among other particulars:

(a) The Court concluded as a matter of law that if the several applicable definitions of "area of production" are void, the defendant is not entitled to the exemption given by Section 13(a)(10) of the Fair Labor Standards Act.

(b) The Court erred in concluding as a matter of law that the defendant has not proved it is entitled to the exemption under section 13 (a) (10) in, for, or during any of the periods involved in this controversy.

(c) The Court erred in concluding as a matter of law that each and every of the applicable definitions of the Administrator of "area of production" is a valid definition.

(d) The Court erred in concluding as a matter of law that the services of the plaintiff were not exempt from the Act because the said services were "farm labor", overlooking the fact that the defendant made no claim of exemption for the services as "farm labor" or "agricultural labor".

(e) The Court erroneously held that the test for the haul is "road mileage" instead of "as the crow flies".

(f) The Court concludes as a matter of law that the defendant's establishment is not within the "open country" or "rural community" because there is within the "immediate locality' 'or "general vicinity" of the establishment a town of more than 2500 which is contrary to the definition and interpretations of the Administrator.

(g) The Court erroneously held that the defendant had admitted violations of Sections 6 and 7 of the Act because the Fifth Defense did not deny these violations but overlooked the fact that in and by the Second Defense the defendant had denied the violations and the Fifth Defense was an affirmative defense.

3. The Court erroneously found as a matter of law that the canning of citrus in the State of Florida was not seasonal because the Administrator had not determined that it was seasonal until August 24, 1940.

4. The canning of citrus is seasonal and was seasonal during all the periods in controversy in this cause and this defendant cannot be deprived of the benefits of Section 7(b)(3) of the Act because the Administrator failed to perform his duties until a time subsequent to the controversies set forth herein.

5. The Court committed error in connection with the third defense of this defendant in finding as a matter of law that this defendant was not entitled to the benefits of Section 7(b)(3) and could not be claimed by this defendant as to each of the employees, overlooking the decision of the Circuit Court of Appeals of the Seventh Circuit in *Walling vs. Swift & Company*, 131 Fed. (2d) 249.

6. No testimony has been taken under the Third Defense and the Court committed error in striking said Third Defense on the ground that the defendant did not allege in said defense that it had paid its employees compensation at the rate of not less than time and a half the regular rate for a period or periods of more than 12 hours in any work day and not less than 56 hours in any workweek.

7. The Court erred in finding as a matter of law that the defendant was not entitled to claim the exemption under section 7(c) of the Act and in erroneously injecting into the issue the question of "area of production" which has no bearing whatsoever on the issues set up by the Fourth Defense.

8. The Court erred in striking the Fourth Defense because the same was inconsistent with the Fifth Defense overlooking the provisions of the rules of practice of this Court and the case law applicable.

9. The Court erred in striking the Fourth Defense on the ground that the defendant and the employees had not

jointly designated the exempt weeks under Section 7(c) overlooking the fact that it is not necessary for a joint designation of the exempt weeks under the law or any interpretation by the Administrator.

10. The Court in striking the Fourth Defense on the ground that the defendant had not theretofore designated the exempt weeks under Section 7(c) overlooked the interpretations of the Administrator of the Wage and Hour Division with reference thereto.

11. The Court overlooked and failed to follow the decision of the Circuit Court of Appeals of the Fifth Circuit in the case of *Fleming vs. Farmers Peanut*, 127 Fed. (2d) 404, which announced the law binding upon this Court.

12. In holding that the defendant was not entitled to apply the exempt weeks under section 7(c) because the defendant had not theretofore designated said weeks as exempt under said section, the Court overlooked the fact that in the case of Lake Wales Citrus Growers vs. Roy L. Janes, et al., lately pending in this Court on or about June 19, 1939, there was issued a temporary restraining order restraining the Administrator of the Wage and Hour Division and the United States Attorney from enforcing said Act and that thereafter on July 8, 1939, a preliminary injunction was issued likewise enjoining the enforcement of said Act to the citrus canners of Florida, including the defendant, which injunction remained in full force and effect until August 1940, which is subsequent to the periods in controversy set forth in the amended complaint; that therefore during the time that said restraining order and injunction were in force and effect this defendant rightfully believing it was not subject to the provisions of the Fair Labor Standards Act did not designate the exempt weeks under section 7(c)

and was not obligated so to do; a certified copy of the opinion of the District Court having heretofore been offered in evidence during the taking of testimon n the issue raised by the Fifth Defense; that this Court should take judicial knowledge of the proceedings in said case which was lately pending in this Court and that the same constitute a valid reason for not designating said exempt weeks by this defendant during said periods of time.

The above petition for rehearing was denied by the Court in the pre-trial conference order hereinafter set out.

On March 12, 1943, the Court entered his ORDER ON THE PRE-TRIAL CONFERENCE held February 24, 1943, said order being in words and figures as follows:

220 (Title Omitted.)

This matter came on for Pre-trial conference pursuant to notice of Plaintiffs, and thereupon the following proceedings were had:

1. The Defendant presented Petition for Rehearing. (Thereupon said Petition was read to the Court.)

The Court:

The Court will permit the filing of the Petition and deny it.

The Defendant thereupon filed Objections to Interrogatories heretofore propounded by the Plaintiffs and by agreement of counsel consideration thereof was deferred.

2. The Defendant presented to the Court Motion for leave to file Additional Defenses, together with such Additional Defenses.

(Thereupon, said Additional Defenses were read to the Court.)

Mr. Reeves:

With reference to the Second Additional Defense which is offered at this time, the Defendant announces that the evidence which the Defendant proposes to offer under said defense is substantially the same testimony as was offered under the fifth defense; that in addition the Defendant proposes to prove under said second additional defense, by substantially the same testimony broken down to show each week's operation, that as to each and every work week Defendant operated within the area of production as defined by the applicable regulation.

Thereupon, the Court granted said Motion and allowed said additional defenses to be filed and it was agreed by counsel that the Plaintiff's Motion to Strike addressed to the Fifth Amended Defense filed by the Defendant should be treated as re-filed and addressed to the said additional defenses and each of the same severally.

The Motion to Strike was thereupon argued and the Court granted the Motion to strike each of said several additional defenses severally.

Thereupon, counsel for Plaintiffs presented a motion for summary judgment and requested that the same be granted as to the claims of all of the hour hands included in the named Plaintiffs and listed in Exhibit No. 1 to the original Complaint, as follows:

Albert Austin, Nannie Brooks, Sallie Baker, John Baker, Luther Black, Archie Boyd, Norman Bright, Everett Bronson, Lonnie Bronson, James M. Bryant, Edgar Campbell, Edward Campbell, Louise Campbell, Louella Campbell,

Buddy Cliatt, Ramon Collins, Kirby Douglas, J. Edd Duckworth, Haldean Fowler, Nellie Granger, Leroy Green, John Hardin, Hattie C. Jones, K. Kersey, Kirby Lanier, Bill Laurence, Ernestine C. Lyles, Harold Munson, Sarah J. McPhee Murphy, Valeria Phinney, Louis F. Pierson, Rosa Lee Prevatt, Susie Prevatt, J. L. Robinson, W. R. Roland, William Rigdon, T. B. Sly, Ernest Streetman, J. W. Streetman, Ruth B. Streetman, Fannie Thompson, Madeline Thompson, Lewis Usery, J. H. Wallis, Dallas Wooten, J. M. Wrenn, Dee Wooten.

Thereupon, for the purpose of dealing with said Motion for summary judgment at this time counsel for Defendant agreed that as to the hour hands just named Defendant would waive any issues raised by the second defense.

Thereupon, the Court finds and holds that in this case there are two separate and distinct groups of Plaintiffs:

1. Those who were employed by the hour; and,

2. Those who were employed on piece work;

and the Court is of the opinion that the two groups of claims are separate and distinct, and that inasmuch as there remains under the pleadings and stipulations of counsel no genuine issue of fact with reference to the claim of the hour hands, separate, final judgment should be taken and entered at this time on the Plaintiffs' motion for summary judgment under Rule No. 54 with regard to said hour hands. However, the Court is of the opinion that, with regard to the claims of the piece workers, there are genuine issues of fact which should be determined in a separate trial.

The Court therefore orders that final judgment be entered at this time on the claims of the said hour workers.

and that the case shall proceed on the claims of the piece workers.

Thereupon, counsel for Plaintiffs requested the Court to award and allow a reasonable attorneys' fee for the services of the attorneys for the hour hands in the prosecution of this suit to final judgment. Thereupon, it was agreed that the amount thereof should be fixed by the Court without the taking of any testimony because the Court is thoroughly familiar with the nature and extent of the attorneys' services to be compensated for.

Thereupon, counsel for Plaintiffs moved the Court to designate a capable person to examine the books and records of the Defendant and ascertain the exact amounts claimed by each hour hand for the periods involved in order that these amounts might be incorporated in the judgment, the compensation for the services of such auditor to be taxes as costs.

Thereupon, the Court granted the motion and ordered that R. C. Pribble, of Orlando, Florida, be hereby appointed as said auditor, and instructed to proceed immediately to gather the required information and report back to the Court.

Thereupon, it is ordered that this case proceed in accordance with the above action taken at this Pre-trial conference.

Done and Ordered at Orlando, Florida, in said District, this the 24th day of February, A. D. 1943.

WILLIAM J. BARKER,
United States District Judge.

On the 9th day of April, the Court entered its FINAL JUDGMENT in words and figures as follows:

223 (Title Omitted.)

This cause coming on this day on motion to enter final judgment for the hereinafter named plaintiffs on the pleadings and evidence in this cause, jury trial having been waived, and the Court having been fully advised in the premises does find as follows:

1. The Defendant filed in this cause five defenses and, thereafter, filed certain amendments and that the Court has heretofore held said defenses insufficient and stricken the same save and except the second defense, which defense has heretofore been waived by the defendant as to the claims of the hereinafter named plaintiffs, findings and orders having been entered thereon:

2. That pre-trial conference has heretofore been held and order entered thereon dated February 24, 1943.

3. That in and by said pre-trial conference order, R. C. Pribble of Orlando, Florida, was appointed as auditor to investigate and report on the matters contained in said order and has this day appeared before the Court giving his testimony as to the amount shown by the books of the defendant to be due and owing to the hereinafter named plaintiffs under the orders of this Court, and the report of the said R. C. Pribble is received and the said auditor is hereby discharged.

4. That the motion for summary judgment on behalf of the hereinafter named plaintiffs should be granted and judgment should be entered for said plaintiffs based upon their services as hourly or time workers and that the claims of said plaintiffs, together with the claims of all other plaintiffs for damages under the Wage and Hour Act, as piece workers, present issues of fact which should

be determined by a separate trial and final judgment should now be entered with reference to said hour hands, among other reasons for those set forth in the pre-trial conference order filed in this cause.

CONCLUSIONS OF LAW.

1. That the hereinafter named plaintiffs are entitled to recover of and from the defendant the respective amounts hereinafter set forth.

2. That the claims of all plaintiffs for damages under the Wage and Hour Act against the defendant for services as piece workers be held for separate trial and are not involved in this judgment.

It is thereupon, Considered, Ordered and Adjudged:

That the following named employees do have and recover of and from the defendant, Holly Hill Fruit Products, Incorporated, the amounts as follows:

Name of Plaintiff	Amount of Overtime	Liquidated Damages	Total
Austin, Albert	$ 54.18	$ 54.18	$ 108.36
Baker, Sallie	127.88	127.88	255.76
Baker, John	124.20	124.20	248.40
Black, Luther	26.80	26.80	53.60
Boyd, Archie	317.05	317.05	634.10
Bright, Norman	2.00	2.00	4.00
Bronson, Everett	28.55	28.55	57.10
Bronson, Lonnie J. L.	107.79	107.79	215.58
Brooks, Nannie	98.10	98.10	196.20
Bryant, James M.	46.58	46.58	93.16
Campbell, Edward	19.28	19.28	38.56
Campbell, Louise	73.30	73.30	146.60
Campbell, Louella	26.21	26.21	52.42
Campbell, Edgar	134.43	134.43	268.86

Name of Plaintiff	Amount of Overtime	Liquidated Damages	Total
Cliett, Buddy	67.50	67.50	135.00
Collins, Ramon	19.28	19.28	38.56
Douglas, Kirby	74.17	74.17	148.34
Duckworth, J. Ed.	12.50	12.50	25.00
Fowler, H. Aldean	3.68	3.68	7.36
Granger, Mellie	52.60	52.60	105.20
Green, Leroy	15.12	15.12	30.24
Hardin, John	153.51	153.51	307.02
Jones, Mattie C.	26.77	26.77	53.54
Kersey, E.	465.64	465.64	931.28
Lanier, Kirby	63.65	63.65	127.30
Lawrence, Bill	217.44	217.44	434.88
Lyles, Ernestine	89.78	89.78	179.56
Munson, Harold	60.00	60.00	120.00
Murphy, Sarah J.	26.70	26.70	53.40
Phinney, Valeria	34.46	34.46	68.92
Pierson, Louis F.	84.35	84.35	168.70
Prevatt, Rosa Lee	94.46	94.46	188.92
Prevatt, Susie	65.53	65.53	131.06
Rigdon, William	5.09	5.09	10.18
Robinson, J. L.	13.63	13.63	27.26
Rowland, W. R.	67.50	67.50	135.00
Sly, T. B.	90.95	90.95	181.90
Streetman, Ernest	20.59	20.59	41.18
Streetman, J. W.	128.00	128.00	256.00
Streetman, Ruth B.	44.10	44.10	88.20
Thompson, Fannie	89.50	89.50	179.00
Thompson, Madeline	1.28	1.28	2.56
Usery, Lewis	62.90	62.90	125.80
Wallis, J. H.	124.61	124.61	249.22
Wooten, Dallas	61.15	61.15	122.30
Wooten, Dee	196.31	196.31	392.62
Wrenn, J. M.	110.84	110.84	221.68
Totals	3,829.94	3,829.94	7,659.88

It is Further Ordered and Adjudged:

That the above named Plaintiffs do have and recover of and from the defendant the sum of $1265.00 hereby allowed as a reasonable attorney's fee to be awarded to the above named plaintiffs.

It is Further Ordered and Adjudged:

That the taxation of costs in this action await the determination of the claims for back pay and overtime wages for piece workers.

Done and Ordered in Chambers at Orlando, Florida, in said District, this the 9th day of April, A. D. 1943.

WILLIAM J. BARKER,
United States District Judge.

On the 14th day of April, Appellant filed its NOTICE OF APPEAL in words and figures as follows:

In the United States District Court in and for the Southern District of Florida, Tampa Division.

Wilma Addison, et al., Plaintiffs,
vs. No. 441 Civ.-T.
Holly Hill Fruit Products, Inc., a Florida Corporation, Defendant.

Notice is hereby Given that Holly Hill Fruit Products, Inc., a corporation, does hereby appeal to the Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this cause by the Hon. William J. Barker, on the 9th day of April, 1943, and recorded in Civil Order Book 4, at page 743.

STATEMENT OF POINTS TO BE RELIED ON BY APPELLANT.

228 (Title Omitted.)

First Point.

The Court erred in his order of January 26, 1943, in sustaining motion of plaintiffs to strike the third defense of the defendant.

Second Point.

The Court erred in his order of January 26, 1943, in sustaining motion of plaintiffs to strike the fourth defense as amended of the defendant.

Third Point.

The Court erred in his order of January 26, 1943, in striking the fifth defense as amended filed by the defendant.

Fourth Point.

The Court erred in his findings of fact and conclusions of law entered on January 26, 1943, in finding that the defendant operated a commercial canning plant during the two seasonal periods in controversy in this cause.

Fifth Point.

The Court erred in his findings of fact and conclusions of law entered on January 26, 1943, in finding that the defendant did not obtain all its commodities from farms in the "immediate locality" or "general vicinity" as defined by the Administrator.

Sixth Point.

The Court erred in his findings of fact and conclusions of law entered on January 26, 1943, in finding that an appreciable portion of the commodities came from a distance beyond the range of usual farm travel.

Seventh Point.

The Court erred in his findings of fact and conclusions of law entered on January 26, 1943, in finding that considerable fruit canned in the defendant's establishment came from neighborhoods as far away as more than 20 miles, 20 miles, 14 miles and 7 or 8 miles.

Eighth Point.

The Court erred in his findings of fact and conclusions of law entered on January 26, 1943, in finding:

"VIII. In and during said two seasonal periods of operation, the establishment of the defendant is not located in the 'open country' or a 'rural community', as defined by the Administrator in his said several definitions, because there was within the range of usual farm travel, at a point not more than four miles away, a town of more than 2500 population according to the applicable United States census."

Ninth Point.

The Court erred in his findings entered on January 26, 1943, in concluding as a matter of law:

"A. If the several applicable definitions of the phrase 'area of production' as made by the Administrator are

void, as claimed in the Fifth Defense, as amended, then the defendant is not entitled to the total exemption given by Section 13 (a) (10) of the Fair Labor Standards Act of 1938 * * *".

Tenth Point.

The Court erred in concluding as a matter of law that the defendant had failed to prove that it was entitled to the total exemption under Section 13 (a) (10) of the Fair Labor Standards Act of 1938 "in, for, or during any of the periods involved in this controversy".

Eleventh Point.

The Court erred in concluding as a matter of law that each of the Administrator's several definitions of "area of production" is a valid definition when applied to defendant's establishment, having in view the purpose of the act to raise sub-standard labor conditions in industrial plants.

Twelfth Point.

The Court erred in his findings of fact and conclusions of law entered on January 26, 1943, in failing and refusing to follow the opinion of this Court in the case of *Fleming vs. Farmers Peanut Company*, 128 Fed. (2d) 404.

Thirteenth Point.

The Court erred in his findings of fact and conclusions of law entered on January 26, 1943, in concluding as a matter of law that the haulage provision in the Administrator's several definitions should be determined by "road miles" and not a radius distance "as the crow flies" from the plant.

Fourteenth Point.

The Court erred in his findings of fact and conclusions of law entered on January 26, 1943, in concluding as a matter of law that the town of Davenport where the establishment of the defendant is located is not included in "open country" or "rural community" because Haines City, Florida, with a population of more than 2500 is located within the "immediate locality" or "general vicinity" of the establishment.

Fifteenth Point.

The Court erred in his findings of fact and conclusions of law entered on January 26, 1943, in concluding as a matter of law that the Fifth Defense filed by the defendant admitted that the establishment of the defendant was being operated under sub-standard labor conditions and that by reason of said alleged admissions the exemption provided by Congress under Section 13(a)(10) of the Act was not applicable to defendant's establishment.

Sixteenth Point.

The Court erred in his findings of fact and conclusions of law entered on January 26, 1943, in holding that defendant's establishment was not entitled to the exemption under Section 13(a)(10) of the Act because other competing canning establishments were located within "immediately locality" and "general vicinity" of defendant's establishment.

Seventeenth Point.

The Court erred in his order of January 26, 1943, in holding that the citrus industry was not seasonal until

August 24, 1940, the date of the finding of seasonality by the Administrator and that such finding could not be retroactive.

Eighteenth Point.

The Court erred in his order of January 26, 1943, in finding that the exemption under Section 7(b)(3) of the Act is only available to the defendant if the defendant paid overtime to employees working in excess of 12 hours a day or 56 hours a week and that because the third defense of the defendant fails to show that the defendant so paid its employees the exemption is not applicable.

Nineteenth Point.

The Court erred in his order of January 26, 1943, in finding that the third defense of the defendant was insufficient in point of law.

Twentieth Point.

The Court erred in his order of January 26, 1943, in holding that this defendant was not entitled to the 14 weeks exemption under section 7(b)(3) of the Act because it had failed to designate said weeks prior to the institution of the suit.

Twenty-first Point.

The Court erred in his order of January 26, 1943, in holding that the claim for 14 weeks exemption under Section 7(c) is inconsistent with the claim of total exemption under section 13(a)(10) of the Act.

Twenty-second Point.

The Court erred in his order of January 26, 1943, in holding that the designation of the 14 weeks exemption

under Section 7(c) of the Act is a matter of agreement between the employer and employee.

Twenty-third Point.

The Court erred in his order of March 24, 1943, in denying petition for rehearing filed by the defendant.

Twenty-fourth Point.

The Court erred in his order of March 24, 1943, in striking the first and second additional defenses filed by the defendant.

Twenty-fifth Point.

The Court erred in entering the final judgment on April 9, 1943.

It is hereby stipulated by and between counsel for the appellant and counsel for the appellees that the above and foregoing statement of the case correctly and properly shows how the questions arose and were decided in the District Court, and shows all pleadings, that the questions presented on this appeal can be determined without an examination of all the pleadings, evidence and proceedings in the Court below, that the foregoing statement of facts sets forth so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the Appellate Court, that it likewise includes a true and correct copy of the final judgment appealed from, same being final judgment entered on April 9th, 1943, and a copy of the notice of appeal from said judgment filed on April 9th, 1943, together with a concise statement of the points to be relied upon by the Appellant.

It is further stipulated and agreed by counsel that the above and foregoing statement complies with Rule 76 of the Federal Rules of Civil Procedure and that the same may be approved by the District Judge and may be certified to the Circuit Court of Appeals as a record on appeal in this cause.

G. P. GARRETT,
ELLIS F. DAVIS,
Attorneys for Appellees.

DOZIER DeVANE,
COUNTS JOHNSON,
R. B. HUFFAKER,
G. L. REEVES,
Attorneys for Appellant.

The above and foregoing statement of the case is approved by me on this 17th day of April, 1943, as a compliance with Rule 76 of the Rules of Civil Procedure and as a proper and correct record on appeal.

WILLIAM J. BARKER,
District Judge.

State of Florida,
County of Hillsborough.

I, EDWIN R. WILLIAMS, Clerk of the above styled Court Do Hereby Certify that the above and foregoing is the original agreed statement of the case lodged in this office by the parties thereto on the 17th day of April, 1943, and I Do Further Certify that the same was duly approved by the District Judge prior to the filing thereof.

In Witness Whereof I have hereunto set my hand and seal of this Court on this 17th day of April, A. D. 1943.

EDWIN R. WILLIAMS,
(Seal) Clerk of the United States District Court in and for the Southern District of Florida, Tampa Division,
By JULIAN A. BLAKE,
Deputy Clerk.

[fol. 224] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of June 1st, 1943

No. 10643

HOLLY HILL FRUIT PRODUCTS, INC.,

versus

WILMA E. ADDISON, et al.

On this day this cause was called, and, after argument by G. L. Reeves, Esq., for appellant, and George Palmer Garrett, Esq., and Ellis F. Davis, Esq., for appellees, was submitted to the Court.

[fol. 225] OPINION OF THE COURT AND SPECIALLY CONCURRING OPINION OF WALLER, CIRCUIT JUDGE—Filed June 24th, 1943

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10643

HOLLY HILL FRUIT PRODUCTS, INC., Appellant,

versus

WILMA E. ADDISON, et al., Appellees

Appeal from the District Court of the United States for the Southern District of Florida

June 24, 1943

Before Hutcheson, Holmes, and Waller, Circuit Judges

HOLMES, Circuit Judge:

Appellant is a cooperative corporation engaged in the packing and canning of citrus fruit at Davenport, Florida.

This is a suit by its employees for wages, overtime, and statutory penalties alleged to be due them by reason of the failure of their employer to comply with the minimum-wage and [fol. 226] maximum-hour requirements (Sections 6 and 7) of the Fair Labor Standards Act.[1] A final judgment was entered in favor of some of the employees, and the employer has appealed.

It is admitted that the wage-and-hour requirements of the Act were not observed, but appellant contends that they were not applicable to its employees because of the provisions of Section 13(a) (10) of said Act. This section provides that Sections 6 and 7 of the Act shall not apply with respect to any individual employed within the area of production (as defined by the Administrator) engaged in handling, packing, storing, preparing in their raw or natural state, or canning agricultural or horticultural commodities for market. It is plain that these employees were engaged in handling, packing, preparing, and canning agricultural or horticultural commodities for market; and the decisive question is whether they performed these activities within the area of production as defined by the Administrator.

Appellant's operations are seasonal, conforming with the harvesting of citrus fruit, and during the two seasons involved in the period covered by this suit it engaged in business from November 14, 1938, to May 26, 1939; and from November 16, 1939, to March 30, 1940. The Fair Labor Standards Act became effective on October 20, 1938, and as of that date the Administrator promulgated Section 536.2 of his Regulations, which provided that an employee was within the area of production under Section 13(a) (10) of the Act if the agricultural or horticultural commodities were obtained by the establishment where he was employed from farms in the immediate locality and the number of employees in such establishment did not exceed seven. The regulation was amended on April 30, 1939, by the addition of a paragraph providing that, with respect to the preparation or canning of perishable or seasonable fresh [fol. 227] fruits, an employee was within the area of production if the employer's establishment was located in a rural community and obtained all of its products from farms

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[1] 29 U. S. C. A., Sec. 201 et seq.; 52 Stat., 1060 et seq.

in the immediate locality. It was further provided that the term "rural community" should not include any town of 2500 or greater population, and the term "immediate locality" should not include any distance of more than 10 miles.

Effective as of June 17, 1939, the regulation again was amended to provide that a worker employed within the area of production within Section 13(a) (10) if he performed his packing or canning operations on commodities that came from farms within the general vicinity of the employer's establishment, and the number of employees engaged therein did not exceed seven.

Our first problem is to determine whether these appellees were employed within the area of production from November 14, 1938, to April 19, 1939, as defined by the regulation effective during that period. In the case of *Fleming v. Farmers Peanut Co.*, 128 F. (2) 404, this court held that the limitation in the regulation as to the number of employees working together in the establishment had no relation to area of production and was void. Conceding without deciding that the remaining portion of the regulation is valid, the question is whether the commodities used by the establishment came from farms in the immediate locality. The evidence shows that 97.24 per cent of the commodities came from farms located within 10 miles of the establishment, and 96/100 of one per cent could not be traced; the balance came from farms less than 25 miles distant. The overwhelming percentage of the fruit obtained from farms within 10 miles was certainly within the immediate locality, and it would be most unreasonable to say that the negligible quantity obtained from a [fol. 228] slightly greater distance should affect the statutory concept of area of production.

The regulation in force during appellant's operations from April 30, 1939, to May 26, 1939, provided that employees engaged in packing or canning perishable fruits were within the area of production if they worked in an establishment that was located in a rural community and that obtained all of its products from farms in its immediate locality. The regulation defined "rural community" to exclude any city or town of 2500 or greater population, and "immediate locality" to exclude any distance of more than 10 miles. Appellant's establishment was located in Daven-

port, Florida, a town of 650 people, and during this period more than 97 per cent of the commodities processed came from farms located within 10 miles of the plant, as we have heretofore indicated. The purchase of so great a portion within a 10-mile radius of the plant, and the acquisition of the negligible balance from farms within 25 miles, were sufficient to prove that the products were obtained within the immediate locality. The language of the regulation should be construed to mean that *substantially all* of the commodities must be obtained within 10 miles of the establishment if the 10-mile limitation is to be held valid. It would be wholly arbitrary and unreasonable to say that employees in one plant are within the area of production if 10,000 bushels of fruit canned are purchased within 10 miles, and the employees in another plant are outside the area of production if only 100 of the 10,000 bushels canned were purchased 11 miles away and the balance was purchased within 10 miles.

During appellant's operations from November 16, 1939, to March 30, 1940, the regulation in force provided that one was employed in the area of production within Section 13 (a) (10) if engaged in handling or canning agricultural or horticultural commodities that came from farms in the [fol. 229] general vicinity of the establishment and the number of employees so engaged did not exceed seven. Again, on the authority of *Fleming v. Farmers Peanut Co., supra*, we disregard as void the limitation with respect to the number of employees, and consider only whether the fruits processed came from within the general vicinity of the establishment. During this period, 91.39 per cent of the fruit processed was purchased from farms within 10 miles of the plant, and an additional 4 per cent came from farms within 25 miles; none was known to have come from any greater distance. In ordinary usage, the words *general vicinity* indicate a larger area than is meant by *immediate locality*, and a distance of 25 miles in this day of highly developed travel facilities is not beyond the range of usual farm travel.[2]

The Administrator must define fairly and truly the area of production; but he cannot create such area, or arbitrarily limit it within false and artificial boundaries. On the other

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[2] Cf. Fleming v. Farmers Peanut Co., 128 F. (2) 404.

hand, this court should not attempt either to legislate or to define the area of production, but only to declare the law applicable to the facts before it, aided by the Administrator's definition, and striking down invalid portions thereof only to the extent that may be necessary in order correctly to dispose of the case. Considering the facts of this case with reference to the location of appellant's plant, it seems to us fairly certain that all of the citrus fruit processed therein came from the area of production as defined by the Administrator.

Finally, we conclude that these appellees were employed within the area of production during the entire period involved here, and that the minimum-wage and maximum-hour provisions of the Act did not apply to them. This result precludes the necessity of discussing the alternative [fol. 230] contentions made by appellant, one of which is that during both periods in controversy the regulation was wholly arbitrary and void except as to those parts that required the material to come from the immediate locality or general vicinity of the establishment. If this contention were sustained, the result would be the same and the exemption would be allowed, because 36.3 per cent of the 48,000,000 boxes of citrus fruit produced annually in Florida was produced in Polk County where appellant's plant was located, being approximately three times as much as was produced in any other county in Florida. The next largest production was in Orange County, approximately 25 miles north of appellant's plant, located at or near the exact geographical center of the largest citrus growing area of any state in the United States. Since it is not necessary to decide the issue presented by this contention, in order correctly to dispose of the case, we refrain from doing so.

The judgment appealed from is reversed, and the cause remanded to the district court for further proceedings not inconsistent with this opinion.

WALLER, Circuit Judge, specially concurring:

It is impossible to study the Fair Labor Standards Act without reaching the definite conclusion that Congress intended to exempt the farmers, in the growing and marketing of their crops, from the provisions and also the effect of that Act. The farmer has been for many years a favorite of Congress, which body recognized the impecunious

position of the average farmer throughout the nation, and that the farmer was unable to pay high wages for labor either in the production or in the marketing of his crops. [fol. 231] It is a known economic fact that one of the chief problems of a farmer is how to market that which he grows, and Congress was aware of that problem. It, therefore, refrained, or intended to refrain, from adding any further burdens or expenses to the farmer in the marketing of his crop, particularly fresh fruits and vegetables of a seasonal nature. In this endeavor Congress provided that those engaged in canning of seasonal fruits and vegetables within the area where such fruits and vegetables were produced would not come within the coverage of the Act during certain seasonal operations. It is reasonable to assume that if the canner who purchases the farmer's fruits and vegetables is required to work his employees shorter hours and pay them higher wages, the added costs will be reflected in a reduction of the price which such canner will pay to the farmer for his products. It is believed that this is one of the things Congress sought to avoid by the exemption in Sec. 213 (a) (10) of the Act.

There are many who believe that the term "area of production" had reference to large geographical areas such as "the citrus belt", "the cotton belt", "the beet sugar belt", "the sugar cane belt", "the corn belt", and the like, and there is much logic in that thought when considered in the light of the purpose of Congress to undertake to protect the farmer against influences adverse to the ready marketing of his products at a fair price.

However, the Administrator has adopted no such broad concept of the term "area of production" and, in fact, has generally disregarded what is, in fact, the area of production, but has converted the actual and factual area of production into an arbitrary creation of his own. The real question is whether the actual area of production is to be disregarded and the definition of the Administrator is [fol. 232] to control rather than the intent of Congress not to handicap the farmer in the marketing of his produce. In short, whether the term "area of production" is to control, or the bracketed phrase "(as defined by the Administrator)" is to control. To put it differently, can the Administrator be said to have defined the area of production of certain commodities when in truth and in fact he has *not*

defined such area of production? Congress can see a rabbit run across a State line and declare it was a lion, and a lion it is, but can the Administrator do that? My thought is that the Administrator must define the area of production in fact and without regard to the number of employees, without regard to the location of a city, and without regard to any factor other than the area within which such fruits and vegetables are customarily, in the usual course of business, brought by the farmer to be marketed or processed.

There is no justification in the Act for restricting the canning or processing plant to any number of employees. There is no justification in the Act, nor in reason, for exempting only canning plants located in cities of not more than twenty-five hundred. There is no justification in the Act, nor in reason, for limiting the area of production to a circle having radii of ten miles if in truth and in fact the farmer living beyond the circumference of such a circle customarily brings his produce to market at a point more remotely removed than ten miles or to a plant located in a city of a population in excess of twenty-five hundred. Congress did not intend to penalize the farmer who lived up at the head of the creek and out of the twenty-mile circle by requiring him to haul his produce to a cannery at a point different from that at which he customarily marketed his produce and made his purchases. It did not intend to require a farmer to haul his produce to a cannery in a town having not more than twenty-five hundred people. Nor did [fol. 233] it intend to penalize the farmer living near a town of more than twenty-five hundred by saying: "You cannot haul your produce to the largest town near which you live unless you want to sell your produce for less money to a canner who has to pay higher wages than the country canner does." Nor did it intend to make it cost the canner more to can the backwoodsman's fruit than it cost it to can the fruit of the suburbanite.

In conclusion, it is my view that the *actual* area of production is the area that the Administrator must define. If he wishes to be technical some of the factors that he might reasonably take into consideration are: (a) availability of other canning plants; (b) freedom of access by good roads; (c) the capacity of the canning plant to handle the produce; (d) the efficiency of the plant; (e) the quantity of produce raised in the area in relation to plant capacity; (g) and in the case of a cooperative cannery (as in the present case)

the location of the members of the cooperative. There are many factors of far more relevancy or pertinency than the number of employees or the population of the town in which located, or the radius of an arbitrary circle.

Until and unless a reasonable definition has been made of the actual "area of production" it seems to me that the Courts would be justified in adopting as the "area of production" that area within which farmers customarily, in the usual course of business, bring, or cause to be brought, their produce to be canned or marketed.

"Area of production" readily suggests something akin to the "trade area" of a town, because it is the habit of the farmers to trade in the same town where they market their produce.

[fol. 234] I concur in the opinion of the Court but think that the opinion might well have gone further in its discussion of the term "area of production".

[fol. 235] JUDGMENT

Extract from the Minutes of June 24th, 1943

No. 10643

HOLLY HILL FRUIT PRODUCTS, INC.,

versus

WILMA E. ADDISON, et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellees, Wilma E. Addison, and others, be condemned, in

solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Waller, Circuit Judge, concurs specially."

[fol. 236] MOTION AND ORDER STAYING MANDATE—Filed July 12, 1943

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

HOLLY HILL FRUIT PRODUCTS, INC., Appellant,

vs.

WILMA E. ADDISON, et al., Appellees

MOTION FOR STAY OF MANDATE

To the Honorable Circuit Court of Appeals for the Fifth Circuit:

Come now the appellees in the above styled cause and show unto this Honorable Court that they intend to apply to the Supreme Court of the United States for a writ of certiorari from the decision of this Court on June 24, 1943 of the appeal in the above styled cause, reversing the decree of the District Court of the United States for the Southern District of Florida.

And thereupon said appellees move this Court to stay the mandate in this cause pending disposition of said application for writ of certiorari.

(Signed) Ellis F. Davis, G. P. Garrett, As Counsel for Appellees.

[fol. 237] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 10643

HOLLA HILL FRUIT PRODUCTS, INC., Appellant,

versus

WILMA E. ADDISON, et al., Appellees

On Consideration of the Application of the appellees in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellees to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at Yazoo City, Mississippi, this 12th day of July, 1943.

(Signed) E. R. Holmes, United States Circuit Judge.

[fol. 238] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1943

The petition herein for a writ of certiorari to the United States Circuit of Appeals for the Fifth Circuit is granted. The Solicitor General is invited to file a brief amicus curiae if he is so advised.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office of the Clerk, U. S. Supreme Court
OCT 2 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 217

WILMA E. ADDISON, ERNESTINE C. LYLES, EDGAR CAMPBELL, SALLIE BAKER AND LUTHER BLACK,

Petitioners,

vs.

HOLLY HILL FRUIT PRODUCTS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE PALMER GARRETT,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 217

WILMA E. ADDISON, ERNESTINE C. LYLES, EDGAR CAMPBELL, SALLIE BAKER AND LUTHER BLACK,

Petitioners,

vs.

HOLLY HILL FRUIT PRODUCTS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS.

To the Honorable Justices of the Supreme Court of the United States:

Wilma E. Addison, Ernestine C. Lyles, Edgar Campbell, Sallie Baker, and Luther Black, Petitioners, respectfully petition the Court for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause therein lately pending between Holly Hill Fruit Products, Inc., Appellant, and the said Petitioners, Appellees, wherein a judgment was rendered by said Circuit Court of Appeals on June 24, 1943,

reversing the judgment of the District Court, and in support of their said petition, petitioners (plaintiffs in the District Court) respectfully show:

A.

The matter in controversy in this cause turns upon the minimum wage and maximum hour requirements of the Fair Labor Standards Act (29 U. S. Code Annotated, Sections 201 *et seq.*, 52 U. S. Statutes 1060 *et seq.*), and more particularly Section 13 (a) 10, whereby there is excepted from the coverage of the Act "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market * * *."

The District Court found that:

The defendant was engaged in canning fruit during the period from November 14, 1938, to May 26, 1939, and from November 16, 1939, to March 30, 1940 (R. 187), and that throughout said two seasonal periods of operation, defendant employed at its establishment in the town of Davenport, Polk County, Florida, in its citrus fruit canning operations and processes, more than two hundred "piece workers" (R. 187) and forty-seven "hour hands," (R. 213), that said town is a town of six hundred and fifty population according to the 15th United States Census, 1930, situated within four miles of an incorporated town, Haines City, in said County, which had a population of over three thousand persons according to both the 15th Census of 1930, and the 16th Census of 1940 (R. 187).

During the first of these two periods, by regulation promulgated October 20, 1938, the Administrator of the Wage and Hour Division of the Department of Labor de-

fined an individual as employed in the "area of production" if engaged in such work on a farm, and on agricultural or horticultural commodities produced exclusively on such farm, or if such commodities are obtained by the establishment where he is employed from farms in the immediate locality, and the number of employees in such establishment does not exceed seven (R. 187 and 188). This regulation remained in effect through April, 1939, when, following a series of administrative hearings, the Administrator added a paragraph to his said definition as follows: "(e) with respect to perishable or seasonable fresh fruits and vegetables, if he is engaged in handling, packing, storing, drying, preparing in their raw or natural state, or canning such products for market in an establishment which is located in the open country or in a rural community and which obtains all of its products from farms in its immediate locality. As used in this subsection (e) 'open country' or 'rural community' shall not include any city or town of 2,500 or greater population according to the 15th United States Census, 1930, and 'immediate locality' shall not include any distance of more than 10 miles" (R. 187-188).

On June 15, 1939, effective June 17, 1939, the Administrator again amended his definition aforesaid to provide that the individual shall be regarded as employed in the "area of production" (a) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven, or * * * (d) if he performs those operations on materials all of which come from farms in the immediate locality of the establishment where he is employed and the establishment is located in the open country or in a rural community. As used in this sub-section (d) "immediate locality" shall not include any distance of more than ten miles and "open country" or

"rural community" shall not include any city or town of 2,500 or greater population according to the 15th United States Census, 1940" (R. 188-189).

The District Court further found:

"VII. In and throughout the said two seasonal periods of operation, the establishment of the defendant did not obtain all of its agricultural and horticultural commodities or materials from farms in the 'immediate locality' or 'general vicinity' of the said establishment as defined by the Administrator. An appreciable portion thereof came from a distance beyond the range of usual farm travel. The general vicinity of defendant's establishment was not sparsely settled, there being several towns and communities within a radius of less than ten miles. Thus, considerable fruit was canned and processed in the defendant's establishment during said season which came from the neighborhood of Haines City, which is within four miles and has several commercial canning plants operating in competition to defendant's establishment. Also considerable fruit was canned and processed in the defendant's establishment during the seasons in controversy, coming from the neighborhood of communities as far away from Davenport as Lake Wales—20 miles—Babson Park, several miles more than 20, Dundee 14 miles, Loughman 7 or 8 miles. Much of this fruit was hauled past other canning factories to reach the defendant's establishment" (R. 192).

"VIII. In and during said two seasonal periods of operation, the establishment of the defendant is not located in the 'open country' or a 'rural community,' as defined by the Administrator in his said several definitions, because there was within the range of usual farm travel, at a point not more than four miles away, a town of more

than 2500 population according to the applicable United States Census" (R. 192-3).

"IX. There was practically no testimony showing the percentage of the fruit processed by the defendant establishment which was procured from groves located at a distance of more than ten miles by the shortest road haul from the establishment; almost all of the testimony on the distance of the point of origin of the commodities processed by said establishment during said two seasonal periods had reference to a ten mile radius, 'as the crow flies' " (R. 193).

"X. The evidence discloses that the defendant is not an establishment operated by the farmers raising the commodities processed, and that the processing is not done by the farmers through the use of their own farm labor on their own farms. On the contrary, although its membership consisted of fruit growers owning groves in two certain townships in Polk County, Florida, the defendant accepted a considerable portion of its commodities from groves of non-members and, in fact, processed many thousands of boxes of fruit delivered to the canning plant by a speculative non-member, the Grapefruit Distributors, Inc., a corporation. The employees of the defendant were not hired by the members, nor were they farm labor. On the contrary, they were hired by the defendant corporation and did no farm or agricultural labor. They were simply industrial employees. The defendant corporation was not itself engaged in agricultural or horticultural labor or work. It was a commercial industrial concern entitled to earn a reasonable profit from canning fruit" (R. 193).

The District Court concluded that the total exemption intended by Section 13 (a) (10) (29 U. S. C. A. Sec. 213 (a) (10), of the Fair Labor Standards Act of 1938) was inapplicable to the defendant (R. 194-197).

The Court of Appeals found it to be admitted that the wage and hour requirements of the Act were not observed (R. 225) but adopted the holding in the prior case of *Fleming* v. *Farmers Peanut Co.* (CCA5, 128 Fed. (2nd) 404), decided by the same Court of Appeals, that the limitation in the Administrator's definitions as to the number of employees was void (R. 226). The Court of Appeals held that: As to the period from November 14, 1938 to April 19, 1939, the evidence showed that 97.24% of the commodities came from farms located within 10 miles, 96/100 of 1% could not be traced, and the balance came from farms less than 25 miles distant, and that "it would be most unreasonable to say that the negligible quantity obtained from a slightly greater distance should affect the statutory concept of area of production" (R. 226). As to the period from April 30, 1939, to May 26, 1939, the Court of Appeals held that the evidence showed that "more than 97% of the commodities processed came from farms located within 10 miles of the plant. • • • The purchase of so great a portion within a ten mile radius of the plant, and the acquisition of the negligible balance from farms within 25 miles were sufficient to prove that the products were obtained within the immediate locality" (R. 226-7). And, as to the period from November 16, 1939, to March 30, 1940, the Court of Appeals held that the evidence showed that "during this period 91.39% of the fruit processed was purchased from farms within ten miles of the plant, and an additional 4% came from farms within twenty-five miles; and none was known to have come from any greater distance" (R. 227). Thereupon, the Court of Appeals held that: "In ordinary usage the words 'general vicinity' indicate a larger area than is meant by 'immediate locality' and a distance of 25 miles in this day of highly developed travel facilities is not beyond the range of usual farm travel" (R. 227). And, finally, "that these

appellees were employed within the area of production during the entire period involved here, and that the minimum wage and maximum hour provisions of the Act did not apply to them" (R. 228).

B.

1. Jurisdiction is invoked under Section 240 of the Judiciary Code, as amended by the Act of February 13, 1925, 43 Statutes 938, 28 U. S. C. A. Section 347.

2. The statute of the United States involved is the Fair Labor Standards Act of 1938 (29 U. S. C. A. Sections 201 et seq.; 52 U. S. Statutes 1060 et seq.) particularly Section 13 (a) (10) thereof, hereinbefore summarized in the first paragraph of this petition.

3. The judgment to be reviewed is dated June 24, A. D. 1943.

C.

The question presented is whether the Court of Appeals correctly held ineffective, in the circumstances set forth in the findings of the District Judge, the Administrator's said three definitions of "area of production."

D.

The said ruling and decision of the Court of Appeals is of such far-reaching extent as to call for a decision of this Court upon the question of federal law here involved. If the said ruling and decision of the Court of Appeals is suffered to stand and become a precedent, it will operate to the prejudice, not only of the petitioners, but of many other persons employed in the canning of fruits and vegetables.

Moreover, until the conflict and confusion is resolved in the seventeen decisions of the lower courts (all district

court decisions except the decisions of the Circuit Court of Appeals of the Fifth Circuit in the case of *Fleming* v. *Farmers Peanut Company* 128 Fed. (2d) 404, and in this present case, construing Section 13 (a) (10) of the Act and the Administrator's definitions of "area of production,") the Administrator cannot know the scope of his power, nor can the employers and employees intended to be included in, or excepted from, the Act know their respective duties and rights under the Act.

The decision of the Court of Appeals, without overruling the findings of fact made by the District Judge, determines the case contrary to these findings.

The decision of the Court of Appeals renders ineffective the definition of "area of production" promulgated by the Administrator although the Act of Congress expressly committed to him the power and duty to define the phrase. It disregards the spirit of the Act by exempting a whole industry from the coverage of the Act. It disregards the rule that the Administrator's regulation is presumed to be valid and based upon sufficient factual reasons. It disregards the intent of Congress as disclosed by the legislative history of the Act. It disregards the rule that exemptions from the scope of an Act of this type are to be strictly construed and exempts the defendant although the Court of Appeals concedes that the defendant is not literally within the exemption. It invalidates the Administrator's definitions which are essential to the claim of exemption and yet disregards the corollary that, if the definitions are invalid, there can be no exemption.

Prayer for Writ.

WHEREFORE, petitioners pray for a writ of certiorari to be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana, commanding that Court

to certify and send to this Court upon a day to be designated, a full and complete transcript of the record and all proceedings in the case entitled Holly Hill Fruit Products, Inc., Appellant, *v.* Wilma E. Addison, et al., Appellees, being Case No. 10643, in said Circuit Court of Appeals, to the end that this cause may be reviewed and determined by this Court, and that the decree of the Circuit Court of Appeals may be reversed, and the petitioners may be granted such other and further relief as may seem proper.

GEORGE PALMER GARRETT,
419 Exchange Building,
Orlando, Florida,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 217

WILMA E. ADDISON, ERNESTINE C. LYLES, EDGAR CAMPBELL, SALLIE BAKER, AND LUTHER BLACK,

Petitioners,

vs.

HOLLY HILL FRUIT PRODUCTS, INC.,

Respondent.

PETITIONERS' BRIEF IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered on June 24, 1943, and is reported as *Holly Hill Fruit Products, Inc.* v. *Wilma E. Addison, et al.*, Case No. 10643 (C. C. A. 5th) — F. (2d) —, Advance Sheet No. — (not yet printed), Opinion by Holmes, Circuit Judge.

II.

Grounds on Which the Jurisdiction of This Court Is Invoked.

The decision of the Court of Appeals involves a novel and important problem and principle of federal law with regard to which the decisions of the lower courts are in conflict and confusion. This problem is the determination of the extent to which the Administrator of the Wage & Hour Division of the Department of Labor, acting under direct authority of Congress to define the phrase, "Area of Production", limiting an exemption from the coverage of the Act can, by his definition, reasonably depart from the dictionary meaning of the phrase in order to carry out the intent of Congress, as he determines that intent from the legislative history of the enactment and from hearings he has himself held to ascertain the proper practical scope of the phrase and the exemption. This case constitutes an important precedent for all District and Circuit Courts of Appeal in dealing with the extent and scope of the exemption granted by Section 13 (a) (10) of the Fair Labor Standards Act. The seventeen decisions by various lower federal courts, including two by the Circuit Court of Appeals for the 5th Circuit, on the validity and effect of the Administrator's definition of "area of production" are at this moment in utter conflict and confusion as to the effectiveness and scope of this exemption.

III.

Statement of the Case.

The petition to which this brief is attached sufficiently states all of the facts that are material to a consideration of the questions presented.

IV.

Specification of Errors Assigned.

There was no error in the District Court. We specify as error the decision of the Court of Appeals in reversing the District Court.

V.

ARGUMENT.

Question: Was the Court of Appeals in error in holding ineffective, in the circumstances set forth in the findings of the District Judge, the Administrator's definitions of "area of production"?

Petitioners conceive that the said ruling and decision of the Court of Appeals is erroneous, in this:

Said ruling and decision overlooks, or fails to give effect to, the essential purpose of the enactment as manifested in Section 2 of the Act: (b) "It is hereby declared to be the policy of this Act through the exercise by Congress of its power to regulate commerce among the several states, to correct and as rapidly as practicable to eliminate," etc., the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.

The whole Act is to be read together with the declared purpose in mind.

The thought back of the Administrator's definitions is admirably set forth in the preamble to the Administrator's first definition of the phrase "area of production", promulgated by him on October 20, 1938, under the authority given

him by Section 13 (a) (10) of the Act of Congress. This preamble reads as follows:

> "It appearing that the intent of Congress in making the special provisions relating to the 'area of production' was to prevent undue disturbance to agriculture and to exempt small businesses clearly related to agriculture to employ occasional workers in addition to members of employer's family without regard to the Wage and Hour Standards of the Act, and
>
> "It appearing that the exemption of only those businesses which employ a small number of workers would not result in material inequalities between firms doing the same type of business; and
>
> "It appearing that such small businesses are predominantly located in the 'open country' or 'rural communities', receive most of their raw products from neighboring farms, and frequently employ workers who spend part of their time in actual operations; and
>
> "It appearing that the exemption herein granted to such small businesses would not defeat the declared purpose of the Act, therefore, in view of the foregoing * * *."
>
> Vol. 3, Federal Register, Page 2536.

The basis for this preamble prefixed by the Administrator to his original definition of the phrase "area of production" is clearly given in the debates in Congress on the Act, the joint committee hearings, and the committee reports.

See, for example, Senate Report #884, 75th Congress, first session; C. R. July 27, 1937, pages 9895, 9904, 9906-7, 9910; C. R. July 30, 1937, pages 10179-81, 10191; C. R. July 31, 1937, pages 10246-7, 10267, 10276; C. R. December 17, 1937, page 2319; C. R. May 23, 1938, page 9626; C. R. May 24 and 25, 1938, pages 9741, 9746.

The debates may be considered. *Federal Trade Comm.* v. *Raladam Co.*, 283 U. S. 643, 650, 75 L. Ed. 1324; *Abram* v. *San Joaquin Cotton Oil Co.*, 49 Fed. Supp. 393 at 401.

Moreover, the said Congressional debates and reports disclose the essential intent of Congress in enacting the Act to include within its provisions all industrial workers and exclude agricultural workers.

That the Administrator's problem was deliberately cast upon him by Congress and he was left with full authority to promulgate a definition, reasonably conceived to carry out the intent of Congress even though it departed from the dictionary meaning of the phrase "area of production", is clear from the colloquy between Senator Black and Senator Schellenbach in the course of the debate on the bill, as follows:

Senator Black asked Senator Schellenbach what would be the definition of "area", would it not be possible to define it more clearly to get the effect. Senator Schellenbach answered, "I gave that considerable thought. I do not believe it is possible, and that is something that the Board (now the Administrator) which has been accused of receiving too much power, will have to decide. It would have to provide a definition of 'immediate production area'" (Congressional Record, July 30, 1937, p. 10181).

In resolving his definitions, the Administrator could well assume that the Act was constitutional. The Supreme Court has so held in the cases of:

Opp Cotton Mills v. *Administrator of the Wage and Hour Division of the Department of Labor*, 312 U. S. 126, 85 L. Ed. 624, and

United States v. *Darby*, 312 U. S. 100, 85 L. Ed. 609.

Likewise, he could well assume that the intent of the Act was to cover all industrial employees engaged in commerce.

Overstreet v. *North Shore Corporation*, — U. S. ——, 87 L. Ed. 423

and to except only those establishments coming strictly and literally within the exemptions of the Act.

He could fairly assume that the Act being a remedial one with a humanitarian end in view is entitled to a liberal construction. *Fleming* v. *Hawkeye Pearl Button Co.* (C. C. A. 8), 113 Fed. 2nd 52; *Bowie* v. *Gonzalez* (C. C. A. 1st), 117 Fed. 2nd 11; *Lofther* v. *1st Nat. Bank of Chicago*, 48 Fed. Supp. 692.

He could fairly assume that exemptions therefrom should be construed strictly. *Fleming* v. *Hawkeye Pearl Button Co. supra; Boyer* v. *Miller Hatcheries*, 42 Fed. Supp. 137; *Abram* v. *San Joaquin Cotton Oil Co.*, 46 Fed. Supp. 969.

A reading of the debates in Congress will demonstrate that the Administrator in defining the phrase properly exercised his judgment and discretion to advance the purpose in the mind of Congress when the Act was enacted.

A reading of the record of the Administrative hearings by his representative, Merle D. Vincent, to ascertain the factual basis for such definitions, and a reading of the findings of the said assistant show that the Administrator had a sufficient basis for using his Congressionally granted power to define the phrase "area of production" as he did.

The Administrator's definition as to number of employees is upheld in the Texas case of *Silgaro* v. *Port Compress Co.*, 45 Fed. Supp. 88.

The distinction between the Administrator's definitions and that of the Court of Appeals rests in the fact that the Court of Appeals has stuck to the dictionary meaning of the phrase and thereby defeated the intent of Congress, whereas the Administrator has given effect to the intent of Congress as he determined it to be.

The Supreme Court has long recognized that while Congress may not delegate legislative power to administrative agencies, Congress may declare its will, and, after fixing a primary standard, devolve upon administrative officers the power to fill the details by prescribing administrative rules and regulations allowing reasonable variations, tol-

erances and exemptions which, because of their variety and need for detailed statement, it was impracticable for Congress to prescribe. *United States* v. *Shreveport Grain & El. Co.*, (1932), 287 U. S. 77, 77 L. Ed. 177. A regulation by a department of government addressed to, and reasonably adapted to, the enforcement of an Act of Congress, the administration of which is confided to such department has the force and effect of law, if it be not in conflict with express statutory provision. *Maryland Casualty Co.* v. *United States*, (1920) 251 U. S. 342, 349, 64 L. Ed. 297. Had Congress itself defined "area of production" as did the Administrator in his regulations, the provision would unquestionably have been valid. Cf. *Tigner* v. *Texas*, (1940), 310 U. S. 141, 84 L. Ed. 1124.

The Congress reposed the controlling discretion as to the scope of the exemption in the Administrator. And where "a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched." *Gray* v. *Powell*, 314 U. S. 402, 86 L. Ed. 301, (1941). It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review. *United States* v. *Bush & Co.* (1940), 310 U. S. 371, 84 L. Ed. 1259. As stated by Mr. Justice Storey in *Martin* v. *Mott*, 12 Wheat. (U. S.) 31, 32, 6 L. Ed. 541; "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."

The Court of Appeals did not reverse the findings of the District Court. The findings of the District Court are clearly based upon sufficient facts to justify the same.

These findings of the District Court find the establishment to be of such character as that the establishment does not fall within the sphere of the exception granted by Section 13 (a) (10).

The Court of Appeals concedes that if the Administrator's definitions are to all respects valid and the exemption is strictly construed, the defendant's establishment is not within the exemption granted by Section 13 (a) (10) of the Act. It overlooks the rule that "those who set up any such exception must establish it as being within the words as well as within the reason thereof"; *U. S.* v. *Dickson*, 15 Pet. 141, 165, 10 L. Ed. 689.

Section 13 (a) (10) of the Act exempting "any individual employed within the area of production (as defined by the Administrator)" contemplates a definition by the Administrator not alone with respect to the meaning of the several words as ascertained by an inspection of the dictionary, but as fairly and reasonably understood in the light of the substantive provisions of the statute, and the declared purpose of the Act as set forth in Section 2 thereof.

It is significant that Section 3 of the Act contains no less than 13 definitions of the words employed in the statute. Yet, the phrase "area of production" is not among those defined. In leaving the definition of this term to the Administrator the Congress could only be contemplating that, in adapting its declared purpose to varying conditions arising, the Administrator would exercise a sound discretion reasonably adapted to the purpose of the Act. The Administrator's several amendments, of his original definition, referred to by the District Court, Record 187 to 192, inclusive, show a progressive effort on the part of the Administrator in this direction. Why should the Administrator be expressly empowered to define the phrase if the dictionary definition is to control?

It may not be presumed that the Administrative hearings referred to by the District Judge (R. 188) afforded no basis for the definitions promulgated by the Administrator's regulations. Fixing the number of employees at "not to exceed 7" has a direct bearing on the Congressional purpose of maintainjng the minimum standard of living deemed necessary. It also has a direct bearing on the intent of Congress (1) to mold the exemption so as to prevent the large scale farmer from securing a competitive advantage over the small scale producer, and (2) to enable small plants to compete with larger more industrialized plants performing similar operations and (3) to provide a wage differential between rural and urban areas and thereby aid the small farmer in marketing his goods.

In the light of this record it may not be justly said that the Administrative hearings afforded no basis for paragraph "E" of regulation 5362 whereby "'open country' or 'rural community' shall not include any city or town of 2,500 or greater population according to the 15th Census, 1930, and 'immediate locality' shall not include any distance of more than 10 miles" (R. 188). Obviously, as the District Judge held (R. 196) such a restriction does not contemplate that a town of greater population than 2500 shall lie within the area.

The opinion of the Court of Appeals stated that "in ordinary usage the words 'general vicinity' indicate a larger area than is meant by 'immediate locality' and a distance of 25 miles in this day of highly developed travel facilities is not beyond the range of usual farm travel" (R. 227). But the finding of the District Judge was that "an appreciable portion (of the commodities or materials processed) came from a distance beyond the range of usual farm travel" (R. 192). This was a finding of the facts presented in this controversy as to the particular circumstances and ought

not to have been overturned by the Court of Appeals by a conclusion of law as to what, country-wide, in general, is the usual range of farm travel.

In the above mentioned finding IX, the District Court found that there was practically no testimony in the record showing the percentage of the fruit processed by the defendant establishment which was procured from groves located at a distance of more than 10 miles by the shortest road haul from the establishment; almost all of the testimony on the distance of the point of origin of the commodities processed by said establishment during said two seasonal periods had reference to a ten mile radius, "as the crow flies" (R. 193). "Shortest road haul" is the only reasonable construction of the word "distance" in the clause of the Administrator's definitions that "immediate locality shall not include any distance of more than 10 miles." Yet, the Court of Appeals, treating the "distance" fixed by the regulation to be "as the crow flies", undertook to find specific percentages of these materials to have come from specific distances within or without a ten mile *radius* (R. 226 and 227).

The District Judge found that each of the Administrator's three definitions effective during the periods in controversy were in all respects valid (R. 194-5). The Court of Appeals cast aside the number factors in the several definitions (R. 226 and 227) and interpreted the Administrator's use of the word "all" to mean "substantially all", and by so doing, rendered ineffective that part of the Administrator's definitions requiring that *all* of the commodities processed must be obtained from the immediate locality or general vicinity of the establishment (R. 227).

We submit that the District Judge was right in measuring the exemption claimed by the Administrator's definitions.

If so, then, on the facts in the record, as reflected in the findings of fact made by the District Judge, he was also right in finding that the defendant's establishment is not exempt under Section 13 (a) (10).

However, if the Administrator's definitions are not valid, no exemption in favor of the defendant exists. On this point a California District Court says:

> "Assuming that the Administrator's definition of 'area of production' is wrong, they (speaking of the defendants) cannot claim exemption under it unless the Administrator redefines the phrase so as to exclude their establishment."
>
> *Redlands Foothill Groves* v. *Jacobs*, District Court, Southern District of California, Central Division, January 5, 1940, 30 Fed. Supp. 995 at 1006, second column. Opinion by Yankwich, Judge.

Conclusion.

We submit that the Administrator faithfully exercised his discretion and judgment in defining the phrase "area of production". His interpretation of this phrase is entitled to great weight.

U. S. v. *American Trucking Associations, Inc.* (1940), 310 U. S. 534.

Miller Hatcheries v. *Boyer*, (CCA 8th, 1942), 131 Fed. (2d) 283 at 286.

If the Administrator's several definitions are valid, the defendant's establishment does not come within the exemption granted by Section 13 (a) (10).

If the Administrator's definitions are invalid, no exemption exists under Section 13 (a) (10), because it was necessary for him to define the phrase before the exemption could be claimed.

In either event, the petitioners are entitled to affirmance of the judgment entered by the District Judge in their favor.

Respectfully submitted,

GEORGE PALMER GARRETT,
As Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 217

WILLIAM E. ADDISON, ET AL.,
Petitioners,

vs.

HOLLY HILL FRUIT PRODUCTS, INC.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONERS.

ELLIS F. DAVIS,
GEORGE PALMER GARRETT,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 217

WILLIAM E. ADDISON, ET AL.,
Petitioners,

vs.

HOLLY HILL FRUIT PRODUCTS, INC.

BRIEF OF PETITIONERS ON CERTIORARI GRANTED.

I.

Official Report of the Opinion Rendered in the Circuit Court of Appeals, Fifth Circuit.

Petition for certiorari was presented to this Court at this Term, and granted on October 11, 1943.

This case was decided on June 24, 1943, by the Circuit Court of Appeals for the Fifth Circuit, on appeal from a judgment of the United States District Court for the Southern District of Florida. The decision of the Court of Appeals is reported as *Holly Hill Fruit Products, Inc.*, vs. *Wilma E. Addison, et al.*, C.C.A., Fifth Circuit, 136 Fed. (2nd) 323, Advance Sheet No. 2, Opinions by Holmes and Waller, Circuit Judges.

II.

Grounds on Which the Jurisdiction of This Court Is Invoked.

The decision of the Court of Appeals reversed a judgment in favor of plaintiffs in an action to recover under the wage and hour provisions of the Fair Labor Standards Act of 1938, Chapter 676, 3rd session, 15th Congress, 52 Statutes 1060; 29 U. S. Code, Section 201, et seq. The problem presented is the validity or invalidity of regulations promulgated by the Administrator of the Wage and Hour Division of the Department of Labor, acting under legislative direction to define the phrase "area of production," as applicable to the exemption contained in Section 13 (a) (10) of the Act. (U. S. Code, Title 29, Section 213 (a) (10)).

Jurisdiction of this Court is invoked under section 240 of the Judicial Code as amended by the Act of February 13, 1925. 43 Statutes 938; U. S. Code, Title 28, Section 347. Jurisdiction of the District Court is to be found in Section 24 of the Judicial Code as amended. U. S. Code, Title 28, Section 41.

III.

Statement of the Case.

Act of Congress Involved.

L. Five named employees of defendant's citrus canning establishment, as individuals and as agents and representatives of other named employees, filed their complaint against defendant for underpay and overtime compensation, liquidated damages, attorneys' fees and costs under the Fair Labor Standards Act of 1938 (29 U. S. C. A. 201 et seq.) 52 Statutes 1060.

Exception in Statute Relied Upon by Defendant.

The defendant, in its amended Fifth Defense (R. 13-23) which the Court of Appeals held good (R. 228), all other defenses being eliminated, relies upon the defense that plaintiffs are excepted from the coverage of the minimum wage and maximum hour provisions of the Act by Section 13 (a) (10) of the cited Act because employed within the "'area of production' (as defined by the Administrator)", and engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state or canning of agricultural or horticultural commodities for market.

Proceedings in the Case.

The plaintiffs sought recovery of defendant on account of minimum wages and overtime earned as employees of defendant during the citrus canning seasons of 1938-1939, and 1939-1940 in the citrus fruit canning establishment operated and maintained by respondent in the town of Davenport, Polk County, Florida. Some of the plaintiffs were hour hands, and some were piece workers. Defendant in the District Court, claimed total exemption from the minimum wage and maximum hour provisions of the Act, under said Section 13 (a) (10) of the Act as well as two cumulative partial exemptions, from overtime, under Sections 7 (b) (3) and 7 (c) of the Act.

As the result of a trial, the District Court made written findings of fact and conclusions of law, disallowed each of the claims of total and partial exemption, and entered a separate judgment in favor of the hour hands, allowing them both minimum wages and overtime according to the proof of their several claims. (Rule 54-B, Federal Rules of Civil Procedure, Reeves vs. Beardall; 316 U. S., 283; 86 L. Ed. 1478).

On appeal by defendant, the Court of Appeals (5 Ct.) reversed the District Court, holding void the limitation in the regulation as to the number of employees, and, conceding without deciding, that the remaining portion of the regulation is valid, concluded that these appellees (petitioners here) were employed within the "area of production" during the entire period involved here, and that the minimum wage and maximum hour provision of the Act did not apply to them (R. 228).

Upon plaintiffs' petition for certiorari, supported by Brief of the Solicitor General of the United States as *amicus curiae*, the Supreme Court granted certiorari.

Facts as Found by the District Court.

The findings of the district court included the following facts:

The defendant was engaged in canning fruit during the period from November 14, 1938, to May 26, 1939, and from November 16, 1939, to March 30, 1940 (R. 187), and throughout said two seasonal periods of operation, defendant employed at its establishment in the town of Davenport, Polk County, Florida, in its citrus fruit canning operations and processes, more than two hundred "piece workers" (R. 187) and forty-seven "hour hands" (R. 213). Said town is a town of six hundred and fifty population according to the 15th United States Census, 1930, situated within four miles of an incorporated town, Haines City, in said County, which had a population of over three thousand persons according to both the 15th Census of 1930, and the 16th Census of 1940 (R. 187).

During the first of these two periods, by regulation promulgated October 20, 1938, the Administrator of the Wage & Hour Division of the Department of Labor defined an individual as employed in the "area of production" if en-

gaged in such work on a farm, and on agricultural or horticultural commodities produced exclusively on such farm, or if such commodities are obtained by the establishment where he is employed from farms in the immediate locality, and the number of employees in such establishment does not exceed seven (R. 187 and 188). This regulation remained in effect through April, 1939, when, following a series of administrative hearings, the Administrator added a paragraph to his said definition as follows: "(e) With respect to perishable or seasonable fresh fruits and vegetables, if he is engaged in handling, packing, storing, drying, preparing in their raw or natural state, or canning such products for market in an establishment which is located in the open country or in a rural community and which obtains all of its products from farms in its immediate locality. As used in this subsection (e) 'open country' or 'rural community' shall not include any city or town of 2,500 or greater population according to the 15th U. S. Census, 1930, and 'immediate locality' shall not include any distance of more than 10 miles." (R. 187-188).

On June 15, 1939, effective June 17, 1939, the Administrator again amended his definition aforesaid to provide that the individual shall be regarded as employed in the "area of production" (a) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven, or * * * (d) if he performs those operations on materials all of which come from farms in the immediate locality of the establishment where he is employed, and the establishment is located in the open country or in a rural community. As used in this sub-section (d) "immediate locality" shall not include any distance of more than ten miles and "open country" or "rural community" shall not include any city or town of

2,500 or greater population according to the 15th United States Census, 1940" (R. 188-189).

The District Court further found:

"VII. In and throughout the said two seasonal periods of operation, the establishment of the defendant did not obtain all of its agricultural and horticultural commodities or materials from farms in the 'immediate locality' or 'general vicinity' of the said establishment as defined by the Administrator. An appreciable portion thereof came from a distance beyond the range of usual farm travel. The general vicinity of defendant's establishment was not sparsely settled, there being several towns and communities within a radius of less than ten miles. Thus, considerable fruit was canned and processed in the defendant's establishment during said season which came from the neighborhood of Haines City, which is within four miles, and has several commercial canning plants operating in competition to defendant's establishment. Also considerable fruit was canned and processed in the defendant's establishment during the season in controversy, coming from the neighborhood of communities as far away from Davenport as Lake Wales —20 miles—Babson Park, several miles more than 20, Dundee 14 miles, Loughman 7 or 8 miles. Much of this fruit was hauled past other canning factories to reach the defendant's establishment" (R. 192).

"VII. In and during said two seasonal periods of operation, the establishment of the defendant is not located in the 'open country' or a 'rural community', as defined by the Administrator in his said several definitions, because there was within the range of usual farm travel, at a point not more than four miles away, a town of more than 2,500 population according to the applicable United States Census" (R. 192-3).

"IX. There was practically no testimony showing the percentage of the fruit processed by the defendant establishment which was procured from groves located at a distance of more than ten miles by the shortest road haul from the establishment; almost all of the testimony on the distance of the point of original of the commodities processed by said establishment during said two seasonal periods had reference to a ten mile radius, 'as the crow flies'" (R. 193).

"X. The evidence discloses that the defendant is not an establishment operated by the farmers raising the commodities processed, and that the processing is not done by the farmers through the use of their own farm labor on their own farms. On the contrary, although its membership consisted of fruit growers owning groves in two certain townships in Polk County, Florida, the defendant accepted a considerable portion of its commodities from groves of non-members and, in fact, processed many thousands of boxes of fruit delivered to the canning plant by a speculative non-member, the Grapefruit Distributors, Inc., a corporation. The employees of the defendant were not hired by the members, nor were they farm labor. On the contrary, they were hired by the defendant corporation and did no farm or agricultural labor. They were simply industrial employees. The defendant corporation was not itself engaged in agricultural or horticultural labor or work. It was a commercial industrial concern entitled to earn a reasonable profit from canning fruit" (R. 193).

The District Court concluded that the total exemption from the minimum wages and maximum hours provisions of the Act intended by Section 13 (a) (10) U. S. C. A. Sec. 213 (a) (10) of the Fair Labor Standards Act of 1939 was inapplicable to the defendant (R. 194-197).

Determination of the Circuit Court of Appeals, Fifth Circuit.

On appeal taken by the defendant, the Circuit Court of Appeals for the Fifth Circuit, found:

Defendant admits that the wage and hour requirements of the Act were not observed by the defendant's establishment (R. 225).

As to the period from November 14, 1938 to April 19, 1939 the Court, on authority of its earlier decision in *Fleming* v. *Farmers Peanut Company*, 128 Fed. 2d, 404, held "that the limitation in the regulation as to the number of employees working together in the establishment had no relation to area of production and was void," and "conceding without deciding that the remaining portion of the regulation is valid," the evidence showed that 97.24% of the commodities came from farms located within 10 miles, 96/100 of 1% could not be traced, and the balance came from farms less than 25 miles distant, and that "it would be most unreasonable to say that the negligible quantity obtained from a slightly greater distance should effect the statutory concept of "area of production" (R. 226).

As to the period from April 30, 1939 to May 26, 1939, the Court of Appeals held that the evidence showed that "more than 97% of the commodities processed came from farms located within 10 miles of the plant. • • • The purchase of so great a portion within a ten mile radius of the plant, and the acquisition of the negligible balance from farms within 25 miles were sufficient to prove that the products were obtained within the immediate locality" (R. 226-7).

As to the period from November 16, 1939 to March 30, 1940, the Court said: "Again, on the authority of *Fleming* v. *Farmers Peanut Co., supra*, we disregard as void the limitation with respect to the number of employees, and consider only whether the fruits processed came from

within the general vicinity of the establishment. During this period, 91.39 per cent of the fruit processed was purchased from farms within 10 miles of the plant, and an additional 4 per cent from farms within 25 miles; none was known to have come from any greater distance. In ordinary usage, the words *general vicinity* indicate a larger area than is meant by *immediate locality*, and a distance of 25 miles in this day of highly developed travel facilities is not beyond the range of usual farm travel".

IV.

Specification of Error.

The Court of Appeals erred in invalidating the Administrator's definition of "area of production" because the said definition was within the standards set up by Congress for the guidance of the said Administrator and a reasonable exercise of the authority delegated to the Administrator by Congress to define said phrase.

V.

Argument.

The Exemption Claimed.

Section 13—(a) The provisions of Sections 6 and 7 shall not apply with respect to: * * * (10) to any individual employed within the area of production (as defined by the Administrator) engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market.

29 U. S. C. A., Section 213 (a) (10).

The Administrator's Three Definitions Applicable to the Citrus Fruit Seasons of 1938-1939 and 1939-1940.

We quote from the District Court's findings of January 26, 1943 (R. 187-189), dealing with the Fifth Defense as

amended (R. 13), the Administrator's three definitions of the phrase "area of production" applicable to our controversy.

VI. The Wage and Hour Administrator promulgated on October 20, 1938, Section 536.2 of the Regulations, purporting to define "area of production" as follows:

"Section 536.2. 'Area of Production.' As used in Section 13 (a) (10) of The Fair Labor Standards Act, an individual shall be regarded as employed in the 'area of production' within the meaning of section 13 (a) (10), in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products.

(a) If he is engaged in such work on a farm and on agricultural or horticultural commodities, produced exclusively on such farm, or

(b) If the agricultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediate locality and the number of employees in such establishment does not exceed seven."

That regulation remained in effect through April, 1939, when, following a series of Administrative hearings, he promulgated, effective April 30, 1939, an additional paragraph to said Regulation 536.2, as follows:

"(e) with respect to perishable or seasonal fresh fruits and vegetables, if he is engaged in handling, packing, storing, drying, preparing in their raw or natural state, or canning such products for market in an establishment which is located in the open country or in a rural community and which obtains all of its products from farms in its immediate locality. As used in this sub-section (e) 'open country' or 'rural community' shall not include any city or town of 2,500 or

greater population according to the 15th United States Census, 1930, and 'immediate locality' shall not include any distance of more than 10 miles."

On June 15, 1939, effective June 17, 1939, the Administrator again amended said Regulation, as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of Section 15 (a) (10), in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products.

(a) if he performs these operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven, or

* * * * * * *

(d) if he performs those operations on materials all of which come from farms in the immediate locality of the establishment where he is employed and the establishment is located in the open country or in a rural community. As used in this sub-section (d), 'immediate locality' shall not include any distance of more than ten miles and 'open country' or 'rural community' shall not include any city or town of 2,500 or greater population according to the 15th United States Census, 1940."

(Quoted from order of January 26, 1943, on issues raised by the amended Fifth Defense (R. 187 to 189).)

THE DEFENDANT HAD THE BURDEN OF PROVING ITS CLAIM FOR EXEMPTION.

The burden of proving the applicability of an exemption rests upon the party pleading it: *Thompson* v. *United*

States, 258 Fed. 196 (C. C. A. 8), cert. denied, 251 U. S. 553; *United States* v. *Dickson*, 40 U. S. (15 Pet.) 141, 165; *Spokane & Inland R. Co.* v. *United States*, 241 U. S. 344, 350, and *Walling* v. *Home Loose Leaf Tobacco Co.*, conclusion of law No. VII.

The defendant assumed that burden and produced evidence for the purpose of establishing its claim to exemption under Section 13 (a) (10) of the Act. We submit that the evidence adduced was, for the reasons hereafter pointed out, insufficient, and failed to establish defendant's said claim to exemption.

IF THE ADMINISTRATOR'S DEFINITIONS ARE VALID THE EVIDENCE DOES NOT SUSTAIN DEFENDANT'S CLAIM FOR EXEMPTION.

On the point as to the number of defendant's employees the evidence adduced shows:

During the seasons in controversy, the defendant employed some forty-seven hour hands and 200 piece workers (R. 148-150 & 213-4).

On the point of the applicability of the said exemption with relation to whether the agricultural or horticultural commodities were obtained from the "immediate locality" or "general vicinity", the evidence presents a total failure to establish what amount of fruit came from within a distance of more than 10 miles of defendant's establishment. All the proof submitted by defendant related to a 10 mile *radius* distance as distinguished from road haul distance. The percentages given by the Court of Appeals, based on the calculations filed in evidence by defendant (R. 180-4) had reference to radius distance (R. 193).

The evidence offered by defendant on the point of origin of the fruit processed was in fact hopelessly vague and inconclusive. Thus:

The witness J. A. Langley (R. 71-72), asked about the fruit which he sold to defendant, answered:

"You sold it to them?

"A. Yes.

"Q. What groves did it come from?

"A. Well, I could hardly tell you. In my own groves —other people's; I don't have any record.

"Q. Were those groves in the Haines City territory this fruit came from?

"A. Most of them were; one probably wasn't.

"Q. Which one?

"A. The one at Hesperides.

"Q. How much came from Hesperides?

"A. Well, I could hardly say how many boxes. I didn't keep a record."

The defendant's witness, Weatherford did not know from what groves the fruit he hauled to the defendant's establishment came (R. 60-61). The defendant's witness Cook had lost his records and has no real memory of the location of the groves whence the fruit he hauled to defendant's establishment came from (R. 44-46). Yet the percentage calculations made by Mr. Hickman, the treasurer of defendant-company, and relied upon by the Court of Appeals was based on the unreliable recollection of these two witnesses (R. 136-138). The treasurer admits that if the defendant's witnesses Cook and Weatherford erred in their memories, his own percentage calculations cannot be relied upon (R. 137). Moreover, these very calculations (R. 180-4) show that in the 1939 season the percentage of speculative fruit purchases made by defendant's establishment, through its subsidiary Grapefruit Distributors Inc. (R. 128 and 140) was 18.74 per cent of the total volume of fruit processed and, in the 1939-40 season, 29.09 per cent of the total volume of fruit processed (R. 180).

Defendant's treasurer admits that this fruit bought by the officers of the defendant for speculative purposes under

the name of Grapefruit Distributors Inc., and processed through the defendant's establishment was bought hither and yon (R. 135), regardless of the distance from the defendant's establishment. The calculations filed by the treasurer (R. 180-4) and relied upon by the Court of Appeals are all out of focus because the treasurer does not know from what groves or what distance this fruit came (R. 138).

It was in the light of this inconclusive and disputed evidence that the District Court found that "defendant did not obtain all of its agricultural and horticultural commodities or materials from farms in the 'immediate locality' or 'general vicinity' of the said establishment as defined by the Administrator" (R. 192), and that "there was practically no testimony showing the percentage of the fruit processed by the defendant establishment which was procured from groves located at a distance of more than ten miles by the shortest road haul from the establishment" (R. 193).

In view of the fact that the trial judge saw the witnesses and heard the evidence and found as stated, and in view of the principle that the burden of proving the applicability of an exemption rests on the party pleading it, the Court of Appeals was clearly in error in reaching different factual findings and conclusions from those of the District Judge. Yet, without these factual misconclusions, there is no logical basis for the decision of the Court of Appeals.

Summary of Argument

Plaintiffs sued for wages due them under the Fair Labor Standards Act of 1938 (29 U. S. C. A. 201 et seq.). The defendant claimed exemption under Section 13 (a) (10) of the Act but admitted inability to qualify for the exemption under the Administrator's three definitions of the phrase "area of production" applicable to the periods in con-

troversy. It, therefore, argued to the District Court that the Administrator's definitions are invalid, but that, under any reasonable definition of the phrase "area of production," it was entitled to the exemption, and undertook to show by evidence that the fruit processed came from the general vicinity of its establishment. The District Court ruled the Administrator's definitions were valid, that if the Administrator's definitions were invalid, no exemption existed, and that an appreciable portion of the fruit processed by defendant came from "beyond the range of usual farm travel" and that, therefore, for all three reasons, the defendant was not entitled to its claimed exemption. In the Court of Appeals the defendant relied upon the decision of the C. C. A. 5th Circuit in *Fleming* v. *Farmers Peanut Company*, 128 F. (2d) 404, which discarded the number factor of the Administrator's definitions and then, further discarding the space limitations in the Administrator's subphrases "immediate locality" and "general vicinity" held that the commodities processed by the Farmers Peanut Company came from within the usual range of farm travel and, therefore, were within the "general vicinity" of its establishment and allowed the exemption. Although the District Judge had found, in our case, that an appreciable portion of the fruit processed came from beyond the range of usual farm travel, the Court of Appeals held, *on the authority of the Farmers Peanut case, supra*, which limited "general vicinity" to "the range of usual farm travel," that defendant was entitled to the exemption.

We contend:

I.

The defendant did not by the evidence it offered in the District Court, establish its right to the exemption it claims, either by the Administrator's definition of "area of production" or that of the CCA, 5th Circuit, in the *Farmers*

Peanut Company case, supra, because its evidence showed that an appreciable portion of the fruit processed at its plant came from beyond the usual range of farm travel.

II.

A. The Administrator's definitions are severally valid as well as to number factor as to their space and population requirements. Since it is conceded that the defendant's establishment does not procure all of the fruit processed from the "area of production" as so defined the defendant is not entitled to the claimed exemption.

B. The Administrator's definitions are valid because:

1. The delegation by the Congress to the Administrator of the power to define the phrase "area of production" was constitutional and set up sufficient standards for his guidance.

2. The Administrator exercised his said delegated power according to said standards. Thus:

(a) The Administrator tried to define the phrase so as to carry out the purpose of the Act as such purpose is set forth in the Act and as it was disclosed by the debates in Congress on the bill that became the Act.

(b) The Administrator held hearings, and gave notices, and considered objections.

(c) The Administrator arrived at his definitions in a reasoned and logical manner.

III.

A. If the Administrator's definitions are not valid, the defendant cannot claim the exemption because:

1. The right to the exemption is dependent on the Administrator's proper execution of the power delegated to

him by Congress to define the same by defining "area of production".

2. The Courts cannot, by defining the phrase for the Administrator, exercise the power delegated by the Congress exclusively to the Administrator.

IV.

A. The Court of Appeals erred in invalidating the Administrator's definition because in doing so:

1. The said Court exceeded its proper function of review of the Administrator's regulation.

2. The said Court either

(a) Overlooked its own holding in the *Farmers Peanut Company* case, supra, that "general vicinity" does not include a distance beyond the range of usual farm travel, or

(b) Improperly overruled the finding of fact by the District Judge that an appreciable portion of the fruit processed at the defendant's establishment came from beyond the range of usual farm travel. (R. 192)

V.

A. The defendant is not entitled to either of its two claims of partial exemption each of 14 weeks in each calendar year under Sections 7 (b) (3) and 7 (c) of the Act because:

1. The district judge so found and the Court of Appeals did not disturb the finding.

2. The Administrator is authorized by Section 7(b)(3) of the Act to determine what is an industry of a seasonal nature, just as he is authorized by section 13(a)(10) to define "area of production".

3. Application of the Section 7(b)(3) exemption depends upon a prior determination by the Administrator of the *seasonality* of the industry, and such determination was

made by the Administrator with respect to the operations performed by respondent only effective August 24, 1940.

GENERAL DISCUSSION OF THE THREE DEFINITIONS BY THE ADMINISTRATOR EFFECTIVE DURING THE PERIOD INVOLVED IN THIS CONTROVERSY.

Three times within the period or periods here involved, November 14, 1938 to May 26, 1939, and November 16, 1939 to March 30, 1940 (R. 187), the regulation was amended. In each instance the elements of distance and number of workers employed appear. In its ruling the Court of Appeals failed to recognize the significance of the latter element of the administrative definition.

In each of the Administrator's definitions of the term "area of production" here involved we find: (1) The number of employees in such establishment shall not exceed seven (R. 188). (2) All of the agricultural and horticultural commodities processed by the company must be obtained by the defendant company from farms in the "immediate locality" or "general vicinity", these sub-phrases being defined as not to include any distance of more than ten miles (R. 188). (3) The establishment of defendant must be located in the "open country" or in a "rural community"; these sub-phrases being defined so as not to include any city or town of 2,500 or greater population.

The Act has devolved upon the Administrator the duty of working out administrative regulations and orders necessary or appropriate to make effective its benefits throughout the entire industrial area of the United States. Its guiding lights are set in the declaration of purpose above mentioned and in the definitions and exemptions found respectively in the 3rd and 13th Sections of the Act.

The "area of production" is not readily, or perhaps even appropriately to be defined by miles, although convenience of transportation may be one element to be considered in

looking for convenient means of determining the area contemplated as indicated by the statute's manifest purpose and intent to recognize the essential difference between the conditions under which agricultural labor is performed and those surrounding industrial employment.

Workers in a neighborhood packing house, serving farms and groves within convenient hauling distance and employing a limited number of men and women, are more closely related to the farm or grove, both in point of interest and in point of economic requirement, than the workers in a great plant in a distant town or city supplying its seasonal requirements of labor from those to be found in town or city. The workers in the neighborhood plant have mutual social interests. Their children attend the same school, and when the radio reports an impending subnormal temperature they join in the all-night vigil required to keep burning the fires and smudges used in protecting the fruit on the trees from the cold.

The ascertaining of the limits of the "area of production" was properly committed to the administrative agency.

Opp Cotton Mills v. *Administrator of the Wage and Hour Division of the Department of Labor*, 312 U. S. 126, 85 L. Ed. 624; and

United States v. *Darby*, 312 U. S. 100, 85 L. Ed. 609.

"It is not necessarily a valid objection to his choice that another could reasonably have been made. The judicial is not to be substituted for the legislative judgment. It is enough that the Administrator has acted within the statutory bounds of his authority, and that his choice among possible alternative standards adapted to the statutory end is one which a rational person could have made."

Federal Security Administrator v. *Quaker Oats Company*, 318 U. S. 218; 87 L. Ed. Adv. Sheets, page 540; Opinion by Chief Justice Stone.

In its recent decisions, the Supreme Court has re-emphasized these principles. *Gray* v. *Powell*, 314 U. S. 402; *Federal Security Admr.* v. *Quaker Oats Corp.*, 318 U. S. 218. In the latter case the Court emphasized the broad "scope that must be allowed to the discretion and informed judgment of an expert administrative body."

The Courts have repeatedly approved the principle that determinations of an administrative agency will not be disturbed unless clearly arbitrary or capricious. *Gray* v. *Powell*, 314 U. S. 492; *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176; *I. C. C.* v. *Union Pacific R. R. Co.*, 224 U. S. 541; *Manufacturers Ry.* v. *United States*, 246 U. S. 658; *Utah Copper* v. *Railroad Retirement Board*, 129 F. (2d) 358, 361 (C. C. A. 10) cert. denied, 317 U. S. 687. In adopting this principle the Supreme Court has said that the judiciary "will not consider the expediency or wisdom of the order, or whether on like testimony it would have made a similar ruling." *I. C. C.* v. *Union Pacific R. R. Co.*, *supra*, 547; *Pacific States Box & Basket Co.* v. *White*, *supra*, at p. 182. Because of the "strength due to the judgments of a tribunal appointed by law and informed by experience" (*Illinois Cent. R. R. Co.* v. *Interstate Comm.*, 206 U. S. 441, 454), its conclusions "will not be disturbed save as in particular instances they are plainly shown to be overborne." *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 54. Consequently, "a rule or regulation promulgated by an administrative agency charged with the administration of an act has the force and effect of law if it is reasonably adapted to the administration of the act and does not contravene some statutory provision." *United States* v. *Standard Crude Oil Purchasing Co.*, 113 F. (2d) 194, 201 (C. C. A. 10).

As expressed long ago in *Boske* v. *Comingore,* 177 U. S. 459, 470:

> "Those who insist that such a regulation is invalid must make its validity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress."

As stated by Mr. Chief Justice Marshall in *Wayman* v. *Southard,* 10 Wheat. 1, 6 L. Ed. 253 at 263, Congress may certainly delegate to others powers that the legislature may rightfully exercise itself. As Mr. Justice Harlan said in the case of *Field* v. *Clark,* 143 U. S. 649, 36 L. Ed. 294 (1891), while Congress cannot delegate the power to make a law, it can confer authority or discretion as to its execution. As stated by Mr. Justice Brandeis in his opinion, in the case of *Pacific States Companies* v. *White,* 296 U. S. 176 (1936), where a regulation is within the scope of authority legally delegated, a presumption of the existence of facts, justifying its specific exercise attaches to the orders of Administrative bodies. The mode of determination of facts being within its control, Congress may reserve to itself the power of determination, or may delegate that power to administrative agencies, Federal Administrative Law, Vom Baur, Volume 1, page 11. The Constitution does not deny Congress the necessary resources of flexibility and practicality which will enable it to perform its functions in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules, within prescribed limits, and the determination of facts to which the policy, as declared by the legislature is to apply, Vom Baur 1, Opus cit., page 21. Congress may validly delegate the determination of facts,

not necessarily the subject of judicial cognizance, to which a declared policy, standard, or rule of conduct applies, to an administrative agency, Vom Baur 1, Opus cit., page 26.

The Fair Labor Standards Act is remedial and must be liberally construed to effectuate its purposes. *Missel* v. *Overnight Motor Transportation Co.*, 126 F. (2nd) 98, 103, affirmed 316 U. S. 572; *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 56. The same liberality of construction should be applied to the regulations promulgated to effectuate the act. *Ralph Knight, Inc.*, v. *Mantel*, 135 F. (2d) 514, 517. The exemptions must be strictly construed. *International Longshoremen's Association* v. *National Terminals Corp.*, 50 Fed. Suppl. 26, 27; *Fleming* v. *Hawkeye Pearl Button Co., supra.*

Debates in Congress.

Whatever may be the right of the courts to take judicial notice of the debates in Congress, it surely is axiomatic that the Administrator specifically charged by the Congress with the carrying out the will of Congress as to an exemption by defining the governing phrase limiting the exemptions may consult such debates. He did so.

Since the legislate history in both the Senate and the House is inconclusive, it will be discussed only briefly.

Congress enacted the Fair Labor Standards Act of 1938 to correct sub-standard labor conditions with regard to the wages and hours of industrial labor. The Congress left it to the Administrator in defining the phrase "area of production" to carry out the purpose of Congress as set forth in Section 2 of the Act to correct the sub-standard labor conditions at which the Act was aimed. From the debates it seems that the main directive by Congress to the Administrator to be deduced from the debates seems to have been to include all industrial labor and exclude labor employed in small neighborhood farm processing plants where the farm-

ers processed their own products and those of their farming neighbors. It was the evident intention of Congress in drafting the Section 13 (a) (10) exemption to draw a line of demarcation between farm and industrial labor. In the Senate this was the purpose of the Schwellenbach amendment exempting the "preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state." (81 Cong. Rec., July 30, 1937 at 7876). However, even in this limited form, the legislators were not willing to define the exemption precisely. The Schwellenbach amendment, it will be noted, exempted such handlers where the commodities processed came from the "area of production". Upon inquiry, by Senator Black, Senator Schwellenbach said his amendment would not apply to a cannery. Upon further inquiry by Senator Black, Senator Schwellenbach was unable to state definitely what was meant by the word "area" used in the exemption. (81 Cong. Rec., July 30, 1937, at 7878). When the bill reached the House, a more comprehensive amendment with respect to "area of production" was introduced by Congressman Biermann. He proposed to enlarge the exemption to include such processes as canning. Mr. Biermann urged that *small* establishments engaged in processing such as canning be exempted. It was made plain in the debates, both in the Senate and the House, that the Congressmen felt that *small neighborhood* processing establishments operated by the farmers and for the farmers, but not industrial establishments operating for profit, should be exempted. 83 Cong. Rec., May 23, 1938, at page 7326, and 83 Cong. Rec., May 24, 1938, at 7402. The Senate's Schwellenbach amendment was, thereupon amended by the House by adoption of a further amendment known as the Biermann amendment to include canning. This amendment was finally incorporated in the Act as Section 13 (a) (10).

It can be argued that, since the cost of processing and

canning the citrus fruit is charged back by the cannery to the farmer, the effect of raising the wages of cannery operatives is to reduce the income of the farmer and that, therefore, the intent of Congress to exempt the farmer is not carried out by a definition making the Act apply to the workers in a large cannery. However, that argument is specious. The cannery workers *are* industrial not farm labor. Moreover the argument can be extended *ad absurdum* by causing it to apply to transportation companies and auction markets, the cost of transportation and sale of fruit being deducted from the farmer's returns on his fruit. We suggest that, after the fruit has passed out of the farmers control into the control of large commercial industrial establishments, such as the defendant's establishment, the general coverage of the Act, and not the farmers' exemption ought to apply. That is how the Administrator seems to have construed the intent of Congress.

HEARINGS BY ADMINISTRATORS WITH REFERENCE TO FORMULATION OF DEFINITION.

Several successive administrators have devoted considerable time and study to the problem of determining what should be a proper definition of the phrase "area of production" as used in Section 13 (a) (10) of the Act. Careful study and thorough understanding of the conditions in the numerous industries concerned were necessary to avoid a definition which would cause unjustified competitive inequalities and grave economic dislocations. In the period from October 20, 1938, to October 6, 1941, eight definitions or amendments were promulgated. Each of these was published in the Federal Register before its effective date.[1] Numerous conferences with the United

[1] 3 F. R. 2536, (October 22, 1938); 3 F. R. 3072 (December 22, 1938); 4 F. R. 1009 (February 25, 1939); 4 F. R. 1655 (April 20, 1939); 4 F. R. 2436 (June 17, 1939); 5 F. R. 2647 (July 24, 1940); 6 F. R. 1476 (March 18, 1941) and 6 F. R. 5165 (October 11, 1941).

States Department of Agriculture experts were held and many representatives of industry and labor were consulted. Extensive hearings, both formal and informal, were conducted upon the application of various industries. Representatives of the fresh fruits and vegetable industries were heard at length. See Hearings on Proposed Amendment of Section 536.2 (area of production) of Regulations issued under the Fair Labor Standards Act of 1938, Wage and Hour Division, United States Department of Labor: General hearings, Reference Nos. 162a (4 vols.), 72 (1 vol.); on fresh fruits and vegetables, Reference Nos. 54 (4 vols.), 73 (2 vols.), 162b (3 vols.), 162c (3 vols.). Twenty-four volumes containing more than 4,000 pages were taken at the formal hearings alone. The definition in issue here was adopted after thorough consideration of many other possible definitions.

DEFENDANT'S DILEMMA.

Either

A. *In promulgating his several definitions of the phrase "area of production", the Administrator applied in a just and reasoned manner the sufficient standards set up for his guidance in the Act*

Or

B. *There is no exemption because the Administrator has failed properly to perform the duty delegated to him to define said phrase and the exemption does not exist.*

In case A above is true, plaintiffs are not excepted from the coverage of the Act because admittedly there were more employees of defendant's establishment than the Administrator's definition allowed and defendant's establishment did not secure all of its commodities from the "immediate locality" or "general vicinity" of the establishment as such phrases were defined by the Administrator.

In case B above is true the plaintiffs are not excepted from the coverage of the Act because the exception provided for in Section 13 (a) (10) has never been given effect and, therefore, the employees in defendant's establishment are within the Act.

We hold with A above, and purpose to demonstrate that it is true. However, if we fail, B must be true, which is likewise cold comfort for the defendant.

PRINCIPLES TO BE APPLIED IN TESTING VALIDITY OF ADMINISTRATOR'S DEFINITIONS.

In order for the Administrator's definition of "area of production" to be valid, the Act must set up sufficient standards for the guidance of the Administrator and the Administrator must apply those standards in a just and reasoned manner.[2]

In the case of *Opp Cotton Mills* v. *Administrator*, *supra*, it was held that the Fair Labor Standards Act sets up sufficient standards for the guidance of the Administrator to enable him to fix minimum wages. This Act sets up the same standards for his guidance in defining the phrase "area of production" for the purpose of the exemption allowed by Section 13 (a) (10) of the Act.

The cases hold:

(1), so long as a policy is laid down and a standard established by a statute, no unconstitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which

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[2] *Opp Cotton Mills, Inc.* v. *Administrator of the Wage & Hour Division of the Department of Labor* (1940), 312 U. S. 126-156, 85 L. Ed. 624. Opinion by Mr. Justice (now Chief Justice) Stone;
Gray v. *Powell* (1941), 312 U. S. 402-423, 85 L. Ed. 301, Opinion by Mr. Justice Reed;
A. L. A. Schechter-Poultry Corp. v. *U. S. A.* (1935), 295 U. S. 495-555, 79 L. Ed. 1570. Opinion by Mr. Chief Justice Hughes, Headnotes 3 and 4.

the policy as declared by the legislature is to apply (*Schechter* case, *supra*); and

(2) In a matter left specifically by Congress to the determination of an administrative body, as is the question of exemption here, the function of review placed upon the courts is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body and an application of the statute in a just and reasoned manner (*Gray* v. *Powell, supra; Shields* v. *Utah*, 305 U. S. 117, 83 L. Ed. 111).

CONGRESS ANNOUNCED A POLICY AND SET UP SUFFICIENT STANDARDS FOR THE ADMINISTRATOR TO FOLLOW.

The policy of the Fair Labor Standards Act of 1938, as set forth in Section 2 of Act (29 U. S. C. A. 202), is to correct and, as rapidly as practicable, to eliminate the substandard labor conditions in industries engaged in commerce or in the production of goods for commerce which cause commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such substandard labor conditions, burden commerce, constitute an unfair method of competition in commerce, lead to labor disputes, and interfere with the orderly and fair marketing of goods in commerce.

The District Judge, in our case, found that the Administrator held hearings to determine the definition to be given for "area of production." (R. 188).

The illuminating opinion of Judge Yankwich in the case of *Redlands Foothill Groves* v. *Jacobs* (Dist. Ct. of California, January 5, 1940), 30 Fed. Supp. 995, at second column, 1002, recites that the Administrator summoned an advisory board of the citrus industry to advise on matters relating to the "area of production". The committee recommended a definition of the phrase to which certain interested parties objected. Hearings were had before the Ad-

ministrator, who, disregarding both the recommendation of the Committee and the protest of the objectors, finally approved the definitions that he promulgated.

The above procedure conforms to the provisions of the Act and complies with all reasonable requirements of the "due process" clause of the Constitution.

IN DEFINING THE PHRASE "AREA OF PRODUCTION" THE ADMINISTRATOR APPLIED THE POLICY AND FOLLOWED THE STANDARDS IN A JUST AND REASONED MANNER.

That the Administrator framed his definitions in a just and reasoned manner to advance the purpose of the Act is clear from the recitals in the preamble to the Administrator's first definition, namely, the regulation of October 20, 1938 (Section 536.2) which reads:

> "It appearing that the intent of Congress in making the special provisions relating to the 'area of production' was to prevent undue disturbance to agriculture and to exempt small businesses closely related to agriculture to employ occasional workers in addition to members of employer's family without regard to the Wage and Hour Standards of the Act; and
>
> "It appearing that the exemption of only those businesses which employ a small number of workers would not result in material inequities between firms doing the same type of business; and
>
> "It appearing that such small businesses are predominantly located in the 'open country' or 'rural communities' receive most of their raw products from neighboring farms, and frequently employ workers who spend part of their time in actual operations; and "it appearing that the exemption herein granted to such small businesses would not defeat the declared purposes of the Act; therefore, in view of the foregoing * * *"
>
> (From preamble to Administrator's Regulation of October 20, A. D. 1938, Section 536.2.)

True, in framing his definitions, the Administrator has departed from the dictionary definition of "area", but the Congress in giving him the power to define "area of production" did not circumscribe the mode of its exercise (*Redlands* case, *supra*, at page 1004). When regulating employment, size has been considered a constitutionally valid criterion (*Id.* and *Miller* v. *Wilson*, 1915, 236 U. S. 373, 382-4, 59 L. Ed. 628.) Size as determined by number of employees is also a proper criterion (*Id.* and *St. Louis Consolidated* v. *Illinois* (1902), 185 U. S. 203, 46 L. Ed. 872; *Carmichael* v. *Southern Coal* (1937), 301 U. S. 495, 81 L. Ed. 1245).

The Act itself defines "agriculture" 29 U. S. C. A. Sec. 203 (f) and exempts employees employed in agriculture as so defined 29 U. S. C. A. Section 213 (6) as well as individuals employed within the "area of production (as defined by the Administrator", engaged in canning agricultural or horticultural commodities for market. 29 U. S. C. A. Sec. 13 (a) (10).

The debates in Congress on the passage of the Act to which the Administrator could repair upon the meaning and intent of Congress in allowing said last mentioned exemption showed that that purpose of Congress was fundamentally to cover all industrial labor, and to exempt the farmer from the burden of complying with the wage and hour provisions of the Act.

Therefore, it was reasonable for the Administrator to define the phrase "area of production" as he did, so as to exempt the small neighborhood canning establishment and so as to include large canning establishments operated not by the farmer and his help, but by sub-standard industrial labor, and for profit.

There Could Not Be Any "Area of Production" Exemption in the Absence of a Valid Definition.

Our argument that Congress properly delegated the authority to the Administrator to define the phrase "area of production" is based upon the premise that the Act provided proper and sufficient standards to govern the Administrator in exercising this authority. It is noteworthy that none of the 21 cases dealing with the validity of the Administrator's definition holds that the Act does not prescribe sufficient standards. If our said premise is sound, and the Act does set up satisfactory standards to guide the Administrator in his delegated task, then the only attack upon his definitions must be that he did not apply these standards in a just and reasonable manner. If this premise is not sound, then the authority was unlawfully delegated and the exemption provided for in the Act does not exist. If the latter alternative be so, then certainly the Administrator's definitions are not valid, in which case there is no valid definition and, therefore, no exemption.

Assuming that the Administrator's definitions of "area of production" were wrong, the defendant cannot claim exemption under it until the Administrator redefines the phrase so as to exclude defendant's establishment. As the power is given to him alone, no court can redefine for him.[3]

There could not be any "area of production" exemption in the absence of a valid definition. The Administrator's exclusive authority to define "area of production" was recognized by the Court of Appeals (R. 228), and indeed it is doubtful that any such legislative power could have been conferred on Federal courts. *Federal Radio Com-*

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[3] *Redlands* case, supra, at page 1096, citing *Proctor & Gamble* v. *United States* (1912), 225 U. S. 282, 297-300, 56 L. Ed. 1091; *Adams* v. *Nagle* (1938), 303 U. S. 532, 543, 82 L. Ed. 899; *Hegeman Farms* v. *Baldwin* (1934), 293 U. S. 163, 79 L. Ed. 259; *Shields* v. *Utah etc. Ry. Co.* (1938), 305 U. S. 177, 181, 83 L. Ed. 111.

mission v. *General Electric Co.*, 281 U. S. 464, 466; *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 444. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 275-276. The language of section 13 (a) (10) in itself affords no exemption from the wage and hour provisions. Literally, only when supplemented by the Administrator's definitions does the exemption become operative. Thus it would seem that a valid definition by the Administrator is prerequisite to the existence of the exemption.

THERE IS A CONFUSION IN THE CASES REGARDING THE VALIDITY OF THE ADMINISTRATOR'S DEFINITION.

Some twenty-one cases in the lower federal courts deal with the Administrator's definition.[4]

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[4] *Redlands Foothills Groves* v. *Jacobs*, 30 Fed. Supp. 995, Yankwich, Judge. Decided January 5, 1940.

Janes v. *Lake Wales*, C. C. A. 5, Sibley, Judge. 110 Fed. (2nd) 653. Decided March 15, 1940.

Fleming v. *Farmers Peanut Co.*, Deaver, Judge. 37 Fed. Supp. 628. Decided March 1, 1941.

Oscar Caliup v. *Terrell Cotton Warehouse Company*, decided May 29, 1941, Dallas District Court, Texas. Oral opinion.

Cedell Clark v. *Jacksonville Compress Company*, Bryant, Judge. 45 Fed. Supp. 43, Tyler Division, Texas. Decided November 22, 1941.

Gordon v. *Paducah Ice Manufacturing Company*, Judge Miller, 41 Fed. Supp. 980, W. D. Ky. Paducah Div. Decided Nov. 16, 1941.

Remington v. *Shaw, doing business as Shaw Feed and Elevator Company*, Western District of Michigan, 5 Wage and Hour Reports 83, Raymond, Judge. Decided January 12, 1942.

Silgaro v. *Port Compress Company*, 45 Fed. Supp. 88, District Court, S. D. of Texas, Corpus Christi Div., Kennerly, Judge. Decided April 16, 1942.

Dean Cox v. *Swift & Company*, District Court, N. D. of Texas, Ft. Worth Div., Wilson, Judge. Decided April 25, 1942.

Jesse Carpenter v. *Waxahachie Cotton Warehouse et al.*, Texas Court of Civil Appeals, Hale, Judge. Decided April 30, 1942.

Fleming v. *Farmers Peanut Co.*, C. C. A. 5, 128 Fed. (2nd) 404, Sibley, Judge. Decided May 25, 1942.

Abram v. *San Joaquin Cotton Oil Co.*, S. D. California, 5 WHR 594, 46 Fed. Supp. 960, O'Connor, Judge. Decided June 3, 1942.

There is no definite trend of policy in these decisions of the Courts which have passed upon the question of the validity of the Administrator's definition of "area of production" unless it is that, since the decision in the case of *Fleming* v. *Farmers' Peanut Company*, C. C. A. 5, 136 Fed. (2nd) 404, which was the first decision on the point by a Circuit Court of Appeals, there has been a trend in the later decisions of the various District Courts to base their rulings on the authority of that case. All of the other cases, included in our foregoing list, are district court cases. Some of these cases held that the number factor is appropriate—more, that it is not. Some of them cast the Administrator's definition wholly aside as arbitrary and capricious. Others of them, including the decisions of the Court of Appeals, in the case of *Fleming* v. *Farmers Peanut Company*, after eliding the number factor from the Administrator's defini-

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Gaskin v. *Clell Coleman & Sons*, Ky. Ct. Ct. Mercer County, Alcorn, Judge. Decided June 19, 1942.

Byus v. *Traders Compress Company*, Western District of Oklahoma, 6 WHR 66, Broaddus, Judge. Decided October 19, 1942.

Phillip B. Fleming, Admr. (Walling) v. *Lincoln Loose Leaf Warehouse Company*, Eastern Dist. of Tenn., Winchester Div., 5 WHR 615, Darr, Judge. Decided 1942.

Walling v. *McCracken County Peach Growers Assn.*, 6 WHR 718, W. D. Ky., Miller, Judge. Decided June 15, 1943.

Shain v. *Armour & Company*, W. D. Ky., 6 WHR 715, Miller, Judge. Decided June 17, 1943.

Rafael Bruno v. *The Hill Bros. Company of P. R.*, not yet reported, District of Puerto Rico, Cooper, Judge. Decided August 20, 1943.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, U. S. Department of Labor v. *The Peacock Corp.* Decided July 23, 1943. U. S. District Court, Eastern District of Wisconsin.

Oscar Holt and William R. Dahl, Plaintiffs, v. Barnesville Farmers Elevator Company, Defendant, U. S. District Court for the District of Minnesota, Sixth Division, Nordbye, Judge. Decided September 13, 1943.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff, v. *Home Loose Leaf Tobacco Warehouse Co., Inc., Defendant.* District Court for the Eastern District of Kentucky. Opinion by Ford, Judge. Decided October 9, 1943.

tion, gave lip service to the remainder of the Administrator's definition, but actually rewrote the remainder of the Administrator's definition, greatly to enlarge the distance element in the Administrator's definitions in Regulation 536.2 of his sub-phrases "immediate locality" or "general vicinity".

Most of the Courts holding that the Administrator's definition must fall, nevertheless hold that the courts must allow the exemption, if they deem the defendant to fall within it. However, the *Redlands* case, *supra*, holds that, if the Administrator's definition is invalid, no exemption exists because the Congress has confided to the Administrator alone the power to define the exempting phrase. We regard this last as the sound view. Moreover, we suggest that this view is particularly applicable where it is not the Administrator (who should have validly defined the exemption) that seeks relief, but, as in our case, employees who will be deprived of their relief if, though the Administrator's definition is invalid, the exemption is nevertheless allowed. The plaintiffs are not seeking prospective relief. They seek to recover wages due them for past periods of time. They had nothing whatever to do with whether the Administrator allowed the exemption or properly exercised his power to define.

Distinctions Between Our Case and the Case of Fleming v. Farmers Peanut Co. Supra.

The case of *Fleming* v. *Farmer's Peanut Company*, C. C. A. 5th, 128 Fed. 404, upon which the Court of Appeals based its ruling in our case, cast out the Administrator's number factor, and disregarded his limiting definitions for his sub phrases "immediate locality" and "general vicinity." It ruled that "general vicinity" was larger than "immediate locality" and that "general vicinity" *excluded distance be-*

yond the range of usual farm travel. It then found the Farmers Peanut Company to be within the exemption of Section 13 (a) (10) of the Act because the commodities processed, which were brought to the defendant's establishment by the farmers themselves, 37 Fed. Supple. 628, came from within the range of usual farm travel.

In our case the District Judge found that an appreciable portion of the fruit processed at defendant's establishment came from beyond the range of usual farm travel.

In this *Farmers Peanut* case, the Administrator was seeking injunction against future violations of the Act. In disposing of the Administrator's definition, Judge Sibley said: "We, therefore, have not a case where the Administrator has failed altogether to define. But if we ought to hold the entire definition void, we say that a failure to define would not enable the Administrator to prevail. It may be that the court cannot define for him but it should withhold its aid in the effort to over-ride the exception which needs his definition until he meets the need lawfully. To do otherwise would be to flout the expressed will of Congress."

If the Administrator's definition was not good the Court of Appeals was right in the *Farmers Peanut* case in denying him relief by injunction because, if he had failed properly to define "area of production", he could not, with clean hands, insist that the defendant was not exempt, because he had failed to exempt it, when he should have done so.

In our case, the plaintiffs are mere employees. If the Administrator has made no valid definition of "area of production" which would exempt defendant, the plaintiffs are not at fault. They do not seek such prospective relief as injunction against further violations of the Act. They seek damages. Either they earned their wages for which they sue and can recover them, or they did not earn them and cannot recover them.

THE HOLDING OF THE COURT OF APPEALS IN OUR CASE WAS CONTRARY TO ITS HOLDING IN THE FARMERS PEANUT CASE, SUPRA.

What the Court of Appeals held in our case is:

"The Administrator must define fairly and truly the 'area of production', but he cannot create such area, or arbitrarily limit it within false and artificial boundaries. On the other hand, this court should not attempt either to legislate or to define the "area of production", but only to declare the law applicable to the facts before it, aided by the Administrator's definition, and striking down invalid portions thereof only to the extent that may be necessary in order correctly to dispose of the case." (R. 227 & 228.)

Thereupon, contrary to the District Judge's findings that an appreciable portion of the agricultural and horticultural commodities processed at the defendant's establishment came from beyond the range of usual farm travel (R. 192), and contrary to its own limitation of the phrase "general vicinity" to "range of usual farm travel" as expounded in the *Farmers Peanut* case, supra, the Court of Appeals said: "Considering the facts of this case with reference to the location of appellant's plant, it seems to us fairly certain that all of the citrus fruit processed therein came from the 'area of production' as defined by the Administrator". (R. 228.)

THE COURT OF APPEALS SHOULD NOT HAVE INVALIDATED A PART OF THE ADMINISTRATOR'S DEFINITION AND USED THE REMAINDER AS THIS AMOUNTED TO REWRITING THE ADMINISTRATOR'S DEFINITION.

Another question is whether it was proper for the court below, which had no power of definition, to apply a portion

of the Administrator's definition after invalidating the remainder. The Administrator provided that both the numerical limitation standard and the general vicinity test be satisfied. Even in the absence of extrinsic evidence, it would appear sufficiently clear that a definition in terms of only one of these conditions does not carry out the Administrator's purpose. The "general vicinity" test standing alone, which would exempt some plants with 200 or more employees, would obviously produce a result different from that contemplated by the definition as a whole. That the portion of the definition applied by the court below does not represent the purport of the Administrator's definition is affirmatively evidenced by the Administrator's abandonment of alternative definitions without the numerical limitation which had been incorporated in earlier Regulations. One of the definitions abandoned as impracticable provided that an establishment was in the "area of production" if it received products from the immediate locality and was located in the open country or a rural community.

Where the parts of an administrative definition are mutually dependent upon one another, and the effect of the definition would be substantially changed by invalidating only a portion, it would seem appropriate to apply to such subordinate legislation the same principle which forbids "the mutilation of a statute." *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312-313. In applying only part of the integrated definition, the Court of Appeals, in effect, provided its own definition; thereby exercising a legislative function. It is believed that the only appropriate scope of judicial action was to hold the entire definition valid or invalid.

When the Court of Appeals Threw Out the Administrator's Definition, It Also Should Have Thrown Out the Claimed Exemption. In Rewriting the Administrator's Definition the Court of Appeals Exceeded the Permissible Limits of Judicial Review.

We submit that while the courts may review the propriety of the Administrator's definition of "area of production" that review must be limited to the questions, (1) whether the Administrator has given a hearing to interested parties, (2) whether in arriving at his determination he had departed from the applicable rules of law, and, (3) whether his definition has a basis in substantial evidence or was arbitrary and capricious. These questions must be determined upon the evidence produced before the Administrator. *Shields* v. *Utah, supra.* The burden of showing the Administrator's failure in any of these respects is upon the defendant who claims the exemption. The exemption is to be construed strictly and the defendant must literally come within it to be entitled to claim it. If the courts find that the Administrator has not validly executed his delegated power, the exemption does not exist. The courts cannot reconstruct the Administrator's definition for him for the Congress has delegated the power to define to him and not to the courts. Since the Court of Appeals found that the Administrator's definitions involved were invalid, the exemption was not available for defendant. In re-writing the Administrator's definitions to fit its own notions, the Court of Appeals exceeded the permissible limits of judicial review of administrative action.

This is so because although Section 10 (a) of the Act seemingly provides for judicial review of an administrative wage order, there is no provision of the Act that there shall be any judicial review of the Administrator's power to define the exemption here involved. We do not undertake

to say that, to the extent of determining whether or not Congress has unlawfully delegated its legislative function to the Administrator in regard to the exemption provided in Exemption 13 (a) (10) of the Act, and to the extent of determining whether or not the Administrator has abided by the standards fixed by the Act for his guidance in allowing the exemption, the Courts may not review the Act and the Administrator's exercise of discretion pursuant thereto with reference to such exemption.

It is submitted, however, that the Court of Appeals clearly exceeded the proper scope of judicial review of administrative action which is legislative in character. Even where review is provided by statute, this Court has ruled that broad scope must be given "the discretion and informed judgment of an expert administrative body" in adopting regulations. *Federal Security Admr.* v. *Quaker Oats Co.*, 318 U. S. 218; *Gray* v. *Powell*, 314 U. S. 402, 411, 413. An administrator's legislative determinations under the statute should not be disturbed if "his choice among possible alternative standards adapted to the statutory end is one which a rational person could have made." 318 U. S. at 233. Thus the decision below is equivalent to a finding that no rational person could have prescribed the standard in question here, *despite the fact that several successive administrators had adopted it.*

The additional cases cited in the foot-note also support our claim that the Court of Appeals on the appeal in our case exceeded the proper scope of judicial review of administrative regulations and orders.[5]

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[5] *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 139-140; *Federal Communications Comm.* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 143-44; *United States* v. *Morgan*, 313 U. S. 409, 422; *Houston* v. *St. Louis Independent Packing Company*, 249 U. S. 479, 484; *Burnet* v. *S. & L. Building Corporation*, 288 U. S. 406, 415.

APPLICABILITY OF CLAIMS OF PARTIAL EXEMPTION SET UP BY THE DEFENDANT UNDER SECTIONS 7 (B) (3) AND 7 (C) OF THE ACT.

In its Third Defense the defendant set up a claim of partial exemption from the overtime provisions of the Act for fourteen weeks in a calendar year (R. 10-12), under section 7 (b) (3) of the Act. In its Fourth Defense the defendant set up a claim of fourteen weeks exemption in a calendar year from the overtime provisions of the Act under section 7 (c) of the Act (R. 12-13).

In its order of January 26, A. D. 1943, the District Court (R. 198) held that the defendant was not entitled to either of these exemptions. Because it found the defendant totally exempt as to minimum wages and over-time under section 13 (a) (10), the Court of Appeals did not deal with the validity of either of these claims to partial exemption. However, to make a proper disposition of this case, both of these claims of partial exemption should be disposed of.

The canning of citrus fruit was not determined by the Administrator to be of seasonal nature until August 24, 1940. (See Administrator's Determination of Seasonality of the Fresh Fruits and Vegetable Industry 5 F. R. 3167. This date was after the expiration of both of the citrus canning seasons involved in this suit.

To establish the invalidity of these two claimed exemptions, we simply rest our case on the findings of the District Court, as set forth in his order of January 26, 1943 (at R. 199-201) as follows:

"The Court finds that Section 7 (b) (3) merely relates to exemption from paying compensation for overtime employment and that in order for the defendant to be entitled to a claim of exemption under said section 7 (b) (3), the industry must have been found by the Administrator to be of a seasonal character. The Court further finds that the

Administrator did not find the citrus industry to be of a seasonal nature until August 24, 1940, which was a date subsequent to all dates and periods in controversy here. (See Federal Register of August 24, 1940.)

"With further reference to said exemption as set forth in the Third Defense of the original answer filed by the defendant under section 7 (b) (3) the Court is of the opinion that said exemption did not exist until such finding by the Administrator and that the finding could not be retroactive. Consequently, the right of the defendant to claim this exemption under Section 7 (b) (3) is disproved by the Third Defense in which said claim is made.

"The Court finds that this exemption (Section 7 (b) (3) is only available to the defendant if the defendant has paid its employees compensation at the rate of not less than time and a half the regular rate at which they were employed for a period or periods of more than 12 hours in any work day and not less than 56 hours in any work week and the Third Defense does not set up that the employer, namely, the defendant herein, has complied with this condition of the said partial exemption claimed.

"Therefore, the Court finds that the Third Defense which claims a partial exemption of 14 weeks under section 7 (b) (3) of the said Act is insufficient in point of law.

"With reference to the amended Fourth Defense which claims a 14 week partial exemption under Section 7 (c) of the said Act, the Court finds that this applies to a period or periods of not less than 14 work weeks in the aggregate in any calendar year in the canning of perishable or seasonal fresh fruits and vegetables or in the first processing within the "area of production" as defined by the Administrator of any agricultural or horticultural commodities during the season's operations. It does not appear from the Fourth Defense that the defendant at any time prior to

the institution of this suit designated any period or periods of not more than 14 weeks in the aggregate in any calendar year involved in the controversy. In fact, the Fourth Defense does not deny, and, therefore, admits the charges of the complaint as amended that the defendant violated the minimum wage and maximum hour provisions of the Fair Labor Standards Act of 1938, apparently relying upon a claim of total exemption under Section 13 (a) (10). Any claim to said partial exemption allowed by Section 7 (c) is inconsistent with a claim of total exemption under Section 13 (a) (10), such as is pleaded in the amended Fifth Defense. Moreover, since employment is a matter of contract, it is reasonable to construe the designation of the particular fourteen work-weeks to be exempted to be a matter for agreement between the employer and the employee, and the Fourth Defense does not aver any such joint designation. Moreover, the employer may elect to claim the partial exemption allowed by Section 7 (c) where applicable and where the employer, as here, appears to have settled with the plaintiff for the weeks worked during the two seasons in controversy, without claiming the partial exemption under Section 7 (c), it is not now entitled to re-open the account and claim same now.

"Therefore, the Court finds that the defendant is not entitled to the partial exemption claimed in the Fourth Defense on account of its canning operations or on account of the first proceeding within the area of production as defined by the Administrator."

(District Court Findings—R. 199-201).

The Court of Appeals did not disturb these findings.

In any event, neither of these two partial defenses is good, and the Section 7 (b) (3) exemption must be based on a prior finding by the Administrator of the seasonality of the industry. Such a finding was not made by the Administra-

tor until after the period in controversy in this case had passed.

Therefore, if the Court of Appeals is reversed, the final judgment by the District Court should be affirmed, without remand for further proceedings.

Conclusion.

As will be seen at R. 212, the final judgment of the District Court was entered up on the basis that none of the defendant's defenses was sufficient, all having been stricken, save and except the second defense, which defense had been waived by the defendant as to the claim of the plaintiffs.

Therefore, if the District Court was right in striking the defendant's third defense, claiming a partial exemption from overtime under Section 7 (b) (3) and the defendant's fourth defense claiming a partial exemption from overtime under section 7 (c) of the Act, and defendant's amended fifth defense claiming a total exemption from the minimum wage and overtime provisions under Section 13 (a) (10) of the Act, there remains nothing further for the Court of Appeals or the District Court to do, and the final judgment of the District Court ought to be sustained without a remand for further proceedings.

Respectfully submitted,

ELLIS F. DAVIS,
GEORGE PALMER GARRETT,
Counsel for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 217.

WILMA E. ADDISON, ERNESTINE C. LYLES, EDGAR CAMPBELL, SALLIE BAKER AND LUTHER BLACK, PETITIONERS,

VS.

HOLLY HILL FRUIT PRODUCTS, INC., RESPONDENT.

BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI.

R. B. HUFFAKER,
C. O. ANDREWS, JR.,
COUNTS JOHNSON,
G. L. REEVES,
Attorneys for Respondent.

Of Counsel:

R. B. HUFFAKER,
Bartow, Florida,
C. O. ANDREWS, JR.,
DEVANE, ANDREWS & PATTERSON,
Orlando, Florida,
COUNTS JOHNSON,
Tampa, Florida,
G. L. REEVES,
Tampa, Florida.

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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 217.

WILMA E. ADDISON, ERNESTINE C. LYLES, EDGAR CAMPBELL, SALLIE BAKER AND LUTHER BLACK, PETITIONERS,

VS.

HOLLY HILL FRUIT PRODUCTS, INC., RESPONDENT.

BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The District Court entered its findings (R. 186) and final judgment (R. 211) and the opinion of the Circuit Court of Appeals was rendered on June 24, 1943 (R. 224) (not yet printed).

II.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS CLAIMED BY PETITIONERS.

Petitioners fail to clearly and briefly set forth the grounds upon which it is claimed that this Court should grant the writ, but from the Petition and the Brief, it would appear that petitioners are relying upon the following:

(a) Novel problem;

(b) Case constitutes an important precedent in dealing with Section 13(a)(10) of the Fair Labor Standards Act;

(c) Conflict and confusion among district courts on validity of Administrator's definitions.

III.

STATEMENT OF THE CASE.

Petitioners in their Brief under this heading merely refer to the petition for the writ of certiorari, which consists almost entirely of quotations from the opinions of the District Court and of the Circuit Court of Appeals.

Respondent feels it important at this time to clearly state the case so that this Court may not be led into granting a writ and then later determine that the same was improperly granted as happened in *Houston Oil Company of Texas* v. *Goodrich*, 245 U. S. 440, 62 L. Ed. 385; *Layne and Bowler Corporation* v. *Western Well Works, Inc.*, 261 U. S. 387, 67 L. Ed. 712; and *United States* v. *Rimer*, 220 U. S. 547, 55 L. Ed. 578.

The Respondent is a cooperative corporation engaged in canning citrus food at Davenport, Florida (R. 224). Five of its employees instituted this suit in the United States District Court for the Southern District of Florida for under-pay, overtime and statutory penalties under Sections 6 and 7 of the Fair Labor Standards Act, 29 U. S. C. A., Sec. 201, *et seq.*, 52 U. S. Statutes 106, *et seq.* (R. 2). The Respondent contended that the Wage and Hour requirements of the Act were not applicable to its employees for the two seasons involved because of the provisions of Section 13(a)(10) of the Act (R. 13) and also filed other defenses (R. 7, 10, 12); the District Court held against the Respondent on all the defenses and the Circuit Court of Appeals held the Respondent within the exemption 13(a)(10) and therefore did not rule upon the other defenses.

The District Court made its findings to the effect that the exemption did not apply to these employees (R. 186) and entered final judgment (R. 211). On appeal the Circuit Court of Appeals decided two points (R. 224) and these two only:

> (1) That the portion of the definitions by the Administrator of the Wage and Hour Division limiting to seven the number of employees in an establishment before it could be within the "area of production;" and therefore entitled to the exemption, was a void limitation, following its former decision in *Fleming* v. *Farmers Peanut Company*, 128 F. 2d 404, and
>
> (2) Applied the particular evidence of the case to the definitions, with the number of employees limitation deleted, and held that under the particular facts the operations of the employees during the two seasons involved were within the definitions.

The appellate court did not pass upon the validity of the regulations, or any of them, other than to follow its former opinion in reference to the number of employees limitation.

Section 13(a)(10) of the Fair Labor Standards Act provides that Sections 6 and 7 of the Act shall not apply to any individual engaged in certain operations including canning agricultural and horticultural commodities within the "area of production" (as defined by the Administrator). It is admitted that the employees were engaged in the operations described in the definition, and the sole question was whether these activities were within the area of production as defined by the Administrator.

The Act went into effect October 24, 1938, and the Administrator promulgated his first regulation defining "area of production" on October 20, 1938 (R. 187), which definition was amended in April, 1939, and thereafter the Administrator redefined the phrase "area of production" from time to time (R. 188, *et seq.*).

The season for the canning of citrus in Florida runs from approximately November 1 to June 1 of the following year (R. 187), and this suit involves only the seasons of 1938-1939 and 1939-1940. During these two seasons the Respondent operated from November 14, 1938, to May 26, 1939, and from November 16, 1939, to March 30, 1940 (R. 187).

For the two seasons involved there was in force the first definition of the Administrator, an amendment and the second definition. After designating the operations to be performed by the individual, which followed the Act, the Administrator in the first and second definitions defined the territory from which the commodity was obtained and then limited the number of employees in the establishment. In the first definition he provided that the commodity must be obtained from the "immediate locality" and in the second definition from the "general vicinity." In the amendment he said that "immediate locality" shall not include any distance of more than ten miles and that the establishment must be located within a town of twenty-five hundred or less population.

It is admitted that the number of employees of the Respondent exceeded seven (limitation in the definition);

that the establishment of the Respondent is located in a small town of some six hundred and fifty people, and, therefore, it being admitted that the operations were within the exemption and the location of the plant within the exemption, the only points left were the validity of the number of employees limitation and whether the commodities were obtained from within distances covered by the regulation.

At the trial the employer produced evidence showing the distance of hauls of the commodities upon which the employees worked during the two seasons. However, the trial court made no findings as to these hauls because it reached the conclusion that since the Respondent had more than seven employees, it could never be within the area of production and evidently followed the contention of the employees that the word "all" did not mean substantially all but that every piece of fruit had to be obtained within the prescribed circle. The evidence as to the hauls was uncontradicted (R. 180) and the Court of Appeals sets forth these percentages in its opinion (R. 224).

For the benefit of the Court, we now set out the definitions involved, the operating times involved and the facts with reference to obtaining the raw products as follows (showing in italics the portion of the definitions held to be void by the Circuit Court of Appeals):

Definition	Time Involved	Haul Less than 10 mi.	25 mi.	Unkno
	SEASON 1938-1939			
An individual shall be regarded as employed in the "area of production" within the meaning of Section 13(a)(10) in * * * canning of agricultural or horticultural commodities for market * * * if the agricultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediate locality *and the number of employees in such establishment does not exceed seven* (R. 188).	Nov. 14, 1938 to	97.24%	1.80%	96 100
(Same regulation with following paragraph added:) (e) with respect to perishable or seasonal fresh fruits and vegetables, if he is engaged in canning such products for market in an establishment which is located in the open country or in a rural community, and which obtains all of its products from farms in its immediate locality. As used in this sub-section (e) "open country" or "rural community" shall not include any city or town of 2,500 or greater population according to the 15th United States Census 1930, and "immediate locality" shall not include any distance of	Apr. 19, 1939 Apr. 20, 1939 to	97.24%	1.80%	96 100

efinition	Time Involved	Haul Less than 10 mi.	25 mi.	Unknown
	SEASON 1939-40			
An individual shall be egarded as employed in he "area of production" vithin the meaning of Section 13(a)(10) in * * canning of agri- ultural or horticul- ural commodities for narket * * * (a) f he performs these perations on materials ll of which come from arms in the general vi- inity of the establish- ment where he is em- ployed *and the number of emlpoyees engaged in those operations in that establishment does not exceed seven or* (d) if he performs those operations on materials all of which come from farms in the immediate locality of the establish- ment where he is em- ployed and the estab- lishment is located in the open country or in a rural community. As used in this sub- section (d) "immediate locality" shall not in- clude any distance of more than ten miles and "open country" or "rural community" shall not include any city or town of twenty- five hundred or greater population according to the 15th United States Census, 1940 (R. 189).	Nov. 16, 1939 to March 30, 1940	91.39%	4%	4.61%

Since certiorari does not lie to review evidence or particular facts, *Southern Power Company* v. *North Carolina Public Service*, 263 U. S. 508, 68 L. Ed. 413; *United States* v. *Johnston*, 268 U. S. 220, 69 L. Ed. 925, the sole point presented on this petition for certiorari is whether the Court will grant a writ for the purpose of considering the action of the Circuit Court of Appeals in holding void one phase or portion of the definitions of the Administrator, when in doing so the Court followed its former opinion in *Fleming* v. *Farmers Peanut Company*, 128 F. 2d 404.

IV.

ARGUMENT.

The petitioners pose the question involved in this case as, "Was the Court of Appeals in error in holding ineffective, in the circumstances set forth in the findings of the District Court, the Administrator's definition of 'area of production?'." The Court should readily recognize that this is not a proper statement of the question involved. The Court of Appeals did not hold the Administrator's definitions invalid, but only deleted from a portion of the definitions one element which limited the number of employees in the establishment and which shall hereinafter be referred to as the "number of employees limitation."

A more correct statement of the question would be:

SHOULD THIS COURT BY CERTIORARI REVIEW THE ACTION OF THE COURT OF APPEALS IN HOLDING INVALID THE NUMBER OF EMPLOYEES LIMITATION IN THE ADMINISTRATOR'S DEFINITIONS?

The current problem before this Court is whether the petition for certiorari should be granted.

This Honorable Court in its Rule No. 38-5(b) indicated the character of reasons which would be considered

on a petition for writ of certiorari, and on numerous occasions in reported cases, most of which were prior to the Jurisdictional Act of 1925, referred to these grounds for granting a writ of certiorari.

Discussion of these announcements is wholly unnecessary but in order that we may have these guides clearly in mind in considering the petition in this case, we refer to a few of them.

In *Ex parte Lau Ow Bew*, 141 U. S. 583, 35 L. Ed. 868, the court said that the jurisdiction to review judgments of the Circuit Court of Appeals by certiorari should be exercised sparingly and with great caution.

In *Ex parte Woods*, 143 U. S. 202, 36 L. Ed. 125, this court said that its power to require judgments of the Circuit Court of Appeals to be certified for review could only be properly invoked when a question of gravity and importance is involved.

Similar announcements were made in *Lau Ow Bew* v. *United States*, 144 U. S. 47, 36 L. Ed. 340; *American Construction Company* v. *Jacksonville, Tampa and Key West Railway Company*, 148 U. S. 372, 37 L. Ed. 486, and in *Forsyth* v. *Hammond*, 166 U. S. 506, 41 L. Ed. 1095.

In *Fields* v. *United States*, 205 U. S. 292, 51 L. Ed. 807, the Court, speaking through Mr. Justice Brewer, said:

> "However important the case may be to the applicant, the question involved is not one of gravity and general importance. There is no conflict between the decisions of state and Federal courts, or between those of Federal courts of different circuits. There is nothing affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public."

In 1916 a large number of petitions for certiorari were being presented and acted upon, and Mr. Justice McReynolds, speaking for the Court in *Furness, Withy and*

Company v. *Yang-Tsze Ins. Assn.*, 242 U. S. 430, 61 L. Ed. 409, clearly pointed out to the bar of this Court the requirements for presenting a petition for writ of certiorari.

With these general principles clearly in mind, let us examine the grounds relied upon by the petitioners in the light of what was involved in this case.

1.

Grounds Relied Upon by Petitioners.

(a)

Novel Problem.

In considering whether a case presents a novel problem, it is not understood that the test is whether some particular facts are novel or have not been presented to this Court, but that the true test is whether the case presents a question of law which is new and unsettled. Applying this test, it clearly appears that the problem is not new because the case presents a question of the power and authority of an administrative agent pursuant to Legislative act. Stated in other words, the question is *"whether the Administrator has only applied the details within the framework of the standards established by Congress."*

This problem has been before the courts, including this Court, on innumerable occasions. As an example of these cases, see:

Currin v. *Wallace*, 306 U. S. 1, 83 L. Ed. 441.

United States v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 84, 77 L. Ed. 175.

Manhattan General Equipment Co. v. *Commissioner of Internal Revenue*, 297 U. S. 129, 134, 80 L. Ed. 529.

Panama Refining Co. v. *Ryan*, 293 U. S. 388, 428, 79 L. Ed. 446.

On the other hand it cannot be contended that this case poses a novel problem in that it presents a question

under the Fair Labor Standards Act because this Act has been before this Court on numerous occasions.

United States v. *Darby*, 312 U. S. 100, 85 L. Ed. 609.

Opp Cotton Mills, Inc., v. *Administrator*, 312 U. S. 126, 85 L. Ed. 624.

Williams v. *Jacksonville Terminal Company*, 315 U. S. 386, 86 L. Ed. 914.

Cudahy Packing Company v. *Holland*, 315 U. S. 357, 86 L. Ed. 895.

Kirschbaum v. *Walling*, 316 U. S. 517, 86 L. Ed. 1638.

Overnight Motor Transportation Co. v. *Missel*, 316 U. S. 572, 86 L. Ed. 1682.

Walling v. *A. H. Belo Corporation*, 316 U. S. 624, 86 L. Ed. 1716.

Warren-Bradshaw Drilling Company v. *Hall*, ... U. S. ....., 87 L. Ed. 99.

Walling v. *Jacksonville Paper Company*, ... U. S. ....., 87 L. Ed. 393.

Higgins v. *Carr Brothers Company*, ... U. S. ....., 87 L. Ed. 398.

Overstreet v. *North Shore Corporation*, ... U. S. ....., 87 L. Ed. 423.

(b)

Case Constitutes an Important Precedent in Dealing with Section 13 (a) (10) of the Fair Labor Standards Act.

The prime consideration to be given this case is whether or not it presents a question of national importance, such a point of law as to require the action of this Honorable Court. The Administrator of the Wage and Hour Division evidently did not think this Court should or would take jurisdiction of this sole point because he did not petition for certiorari from the opinion of the Circuit Court of Appeals in *Fleming* v. *Farmers Peanut Company*, 128 F. 2d 404, where the Fifth Circuit first held invalid the limitation in the definitions as to the number of employees and which was the authority followed by the

court in the present case. The Administrator was a party to that suit. It is contended by appellees that *this case* constitutes a precedent. The Farmers Peanut Company case is the precedent.

As a matter of fact, the present suit was pending at the time of the decision of the Circuit Court of Appeals in the Farmers Peanut Company case and the trial court then entered an order with reference to the number of employees limitation, in which he said:

> "Therefore, this Court holds that any such limitation in any of the definitions involved in this case is surplusage and does consider the definitions with such limitation deleted" (R. 39).

This point did not come up again in the case until the trial court entered his conclusions of law holding that this element was properly a part of the definitions.

Although the particular definitions involved in this case have been changed and superseded many times, the present definition still contains a similar limitation providing in effect that an establishment cannot be within the area of production if it has more than ten employees; and therefore, the holdings of the Circuit Court of Appeals of the Fifth Circuit would likewise apply to the present definition as far as that particular portion of same is concerned. However, as pointed out above, the Administrator himself evidently did not think this such an important part of his definition that this Court should be called upon to decide whether he erroneously placed this one element in his definition.

We think the Court should also take into consideration the fact that although the Circuit Court of Appeals struck this one element from the definitions of the Administrator in May of 1942 (Farmers Peanut) he has evidently not considered such action as vitally affecting the other portions of his definitions and has not amended or changed his definitions since that date. His present

definition, containing the number of employees limitation, is set forth Page 191 of the Record, which definition was promulgated on October 6, 1941.

In reaching a decision in this case, the Court of Appeals did not pass upon the validity of the numerous other elements in the involved definitions, but applied the particular facts of this case to these definitions and held that the employees were within the area of production as defined by the applicable definitions, after striking the number of employees limitation. There are numerous elements of the definitions which are not pertinent to the operations of the Respondent, and of course these were not considered or ruled upon in any way by the district court or the appellate court. The Circuit Court of Appeals found it unnecessary to rule upon the portions of the definitions providing that the establishment must be located in open country or in a rural community and obtain all of its products in its immediate locality, nor the definition of "open country" or "rural community" as being a location outside a town of twenty-five hundred or greater population, nor did it pass upon the provisions that an "immediate locality" should not include any distance of more than ten miles.

Petitioners have been unable to locate any announcements of this Court on the question of whether a decision by a Court of Appeals should be reviewed by certiorari if there is a prior decision by the same or other circuits which the current case follows although it would seem that such fact should be given consideration by this Court. In other words if the Circuit Courts of Appeals of this country for a number of years had been in absolute harmony on some point, should this Court exercise its power by granting the petition to review a case on the same settled point? There are no other decisions by circuit courts of appeals on this point, and therefore no conflict or confusion between different circuits.

Congress provided that the Administrator should define area of production. This he did by purporting to lay

down certain rules to determine *area* and, after he had performed this task, he attempted to go further and say that the size of the establishment would likewise determine the area. Although he very loosely and indefinitely defined this surface of the earth where the commodity was produced, he went far beyond any powers given him by Congress by saying that, although he had thus defined the area, it was no longer the area where the commodity was produced if the establishment had more than seven employees.

The number of employees limitation did not apply where the establishment was located in the open country and obtained its commodities within ten miles, did not apply to any of the definitions providing that an employee was within the area of production if he was engaged on a farm and worked on commodities exclusively from that farm, did not apply to dry edible beans nor to Puerto Rican leaf tobacco. If this limitation is so important to a proper defining of area of production, why did the Administrator omit such limitation in these instances?

In his first definition of October 20, 1938, he provided in substance that an employee was within an area of production in certain activities set forth in the Act, if the commodities obtained by the establishment where he was employed came from farms in the immediate locality and the number of employees in the establishment did not exceed seven. In April, 1939, he issued a separate definition for perishable and seasonal fresh fruits and vegetables. This was the twenty-five hundred population and ten-mile haul criterion but no reference whatsoever is included in this definition as to the size of the establishment; i. e., as to the number of employees.

In June, 1939, the Administrator promulgated another regulation which was applicable throughout the second season involved in this case, which provides an alternative; (a) if the materials all come from the general vicinity of the establishment and the number of employees

did not exced seven or (d) if the establishment was located in a town of less than twenty-five hundred and the commodities were obtained from a distance of not more than ten miles. The number limitation was not included in (d) above.

(c)

Conflict and Confusion Among District Courts on Validity of Administrator's Definitions.

Petitioners allege that there is a conflict and confusion involved in the "seventeen decisions" of district courts and likewise state in the Brief that the "seventeen decisions" by the various lower Federal courts are in utter conflict and confusion as to the effectiveness and scope of this exemption. However, these cases are not cited to the court, and the only decision of a district court cited by petitioners in their Brief on the validity of the number of employees is *Silgaro* v. *Port Compress Company*, 45 Fed. Supp. 88. In our research we have found several district court cases (but not seventeen) that have dealt with the definitions of area of production. The reference to this point in the Silgaro case is purely *obiter dictum*. In that case the District Judge reached the conclusion that the definitions of area of production in the June 16, 1939, regulation did not apply to the employer in that case because the employer had more than seven employees and because it was located in a town of more than twenty-five hundred. In other words, he disregarded the definitions entirely and held that under the facts in that case the defendant was within the area of production although the facts showed that ninety per cent of the commodity was produced in four different counties and evidently the other ten per cent at a greater distance. In the opinion, he said:

> "I am unwilling to say that the Administrator, in defining area of production, may not reasonably classify compresses as to number of employees and location."

which was not pertinent to and had nothing to do with his final ruling in the case.

However, conflicts between a decision of a circuit court of appeals and that of a district court or courts are outside the rule which moves this Court to grant the writ solely on the ground of a conflict of decisions. *Jurisdiction of the Supreme Court of United States*, page 576, *et seq.* The above work points out:

> "Maintaining consistency within the circuits is the task of the Circuit Courts of Appeals, which were established for the express purpose of relieving the Supreme Court of supervision over the decisions of District Courts" (Page 577).

In *United States* v. *Constantine*, 296 U. S. 287, 80 L. Ed. 233, 236, this Court said:

> "In its petition for *certiorari* the United States, though admitting the absence of a conflicting decision by the Circuit Court of Appeals of any other circuit, called attention to diverse decisions in the district courts, to the many other cases pending in which action is awaiting authoritative settlement of the question presented herein, to the large amount of money involved, and to the number of persons whose liability will remain uncertain until the dispute is finally settled. The question thus assumes the importance required by Rule 38 and the writ issued accordingly."

From this language it clearly appears that in the Constantine case the writ was not issued solely because of a conflict of decisions among the district courts but the other elements were considered sufficient to give the question importance.

In the first place we are not cognizant of any other suits pending, awaiting authoritative settlement of the question presented herein, other than one other suit pending in the district court in the Southern District of Florida. There is not a large amount of money involved.

nor any large number of persons whose liability will remain uncertain until the dispute is finally settled. If on the other hand the Circuit Court of Appeals had held void all of the definitions involved in their entirety, a question of importance would probably have arisen, but not where the court only eliminated a small portion of the definition and did not pass upon the validity of the balance of the definitions.

The statute of limitations has now barred any claims in Florida that did not accrue prior to three years before this date and, since the citrus industry is seasonal, no claims could have accrued during the off-season. Therefore, all claims are barred that arose prior to the beginning of the 1940 season—about November 15, 1940. In other words, any claims that may have arisen under the definitions of October 20, 1938—immediate locality and seven employees; April 19, 1939—twenty-five hundred population and ten-mile haul; and June 15, 1939—general vicinity and seven employees, are now barred and although we do not purport to know the statutes of limitations of the other states, from the reported cases, we find that they run two or three years in each state. Each of the definitions above referred to has been superseded by subsequent definitions of July 23, 1940—general vicinity and ten employees; March 12, 1941—general vicinity and ten employees and October 6, 1941—general vicinity and ten employees, so far as applicable to the handling or canning of citrus products.

So that the question finally evolves on the present importance of the action of the court in eliminating the employee limitation as it applies to "handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products." The lower court did not pass upon the validity of that portion of the definition which provides that the materials must come "from farms in the general vicinity of the es-

tablishment" which of course is the very heart or substance of the definitions. This point is not before the Court. If it were, then it might be of such importance as to warrant the issuance of the writ.

Another matter bearing upon the question as to whether this is important is the fact that, in September of 1940, the citrus industry including canning agreed with the Administrator of the Wage and Hour Division that beginning October 1, 1940, the industry would comply with the Wage and Hour Act. See Release 1062, September 26, 1940. Until that time the industry was protected under injunction issued by the United States District Court for the Southern District of Florida, in the case of *Lake Wales* v. *Andrews*, and which injunction was about that time dissolved by the Circuit Court of Appeals on procedural questions. The industry rightfully thinking it was exempt from Sections 6 and 7 of the Act, had not generally complied therewith up until that time. It is realized that such an agreement was not binding upon employees but, as pointed out above, any purported claims of employees for services rendered prior to that date have now been barred by the three-year statute of limitations of the State of Florida, Section 9511, Florida Statutes, 1941. As a matter of fact, the 1943 Legislature of the State of Florida passed a one-year limitation on claims for back wages or overtime, Chapter 21892, Acts of 1943.

Some of the district court decisions, involving the definitions of "area of production," are:

Lake Wales Citrus Growers Association v. *Elmer F. Andrews*, (S. D. Fla.) (not published), holding the applicable definition void. This case was later reversed by the Circuit Court of Appeals, 110 F. 2d 653, solely on a procedural question.

Fleming v. *Farmers Peanut Company*, 37 Fed. Supp. 628 (later 128 F. 2d 404), which struck out the number of employees limitation in the definition saying:

> "Both the language and the legislative history of the Fair Labor Standards Act indicate, on the contrary, that the application of the act should not depend upon the number of employees employed by a particular employer, but rather upon the character of the services of the particular employee, and, with particular reference to the exemption contained in Section 13(a)(10), upon the location of the place of employment in relation to the area in which are produced the agricultural or horticultural commodities upon which the services of the employee are performed."

George Byus v. *Traders Compress Company*, W. D. of Oklahoma (not published), holding the definition void but making no particular reference to the number of employees limitation.

Oscar Caliup v. *Terrell Cotton Warehouse Company* (N. D. of Texas) (not published), likewise holding the definition void as to the cotton industry but not particularly passing upon the number of employees limitation.

Walling v. *Yeakley* (District of Colorado) (not published), holding the "general vicinity" element to be reasonable and declaring the operations within the definition without specifically passing upon the validity of the number of employees limitation.

Clark v. *Jacksonville Compress Company*, 45 Fed. Supp. 43, holding the definition void, specifically striking the number of employees limitation.

Redland Foothills Grove v. *Jacobs*, 30 Fed. Supp. 995, denied injunctive and declaratory relief because of lack of parties but announced approval of definitions.

Walling v. *Antonioto Mill and Elevator Company* (D. C. Colorado), which went off solely on question of facts.

Gordon v. *Paducah Ice Manufacturing Company*, 41 Fed. Supp. 980, upholding definitions.

In *Walling* v. *McCracken County Peach Growers Association*, the District Court for the Western District of Kentucky on June 15, 1943, held that the Administrator had exceeded the authority delegated to him by Congress in including in his definition of area of production that the number of employees employed by the establishment must not exceed ten (referring to the current definition), citing with approval the *Farmers Peanut Case, supra.*

The District Court for Puerto Rico in *Rafael Bruno* v. *Hills Bros.*, on August 19, 1943, rendered an opinion in line with our contentions. Copy of opinion being shown in Appendix B.

Judge Underwood in the case of *Devoe* v. *Atlanta Paper Company*, (N. D. Ga., 1941) 40 Fed. Supp. 284, has rejected the contention with reference to the validity of the Administrator's definition of executive and administrative employees, in which definition the Administrator included a provision that the employee must earn a salary of at least $30 a week. Judge Underwood said:

> "Although the Administrator may legally define the term administrative employee with wide discretion within the meaning of such term, he can not go beyond that and add elements which form no part of such conception. In other words, he can not add an element which is not a real incident to executive work. He can not go outside of the meaning of such words and add an element not intended by Congress and virtually legislate to bring in a class of employees not intended. It is clear from the record in this case, and conceded by both sides, that plaintiff was an employee employed in a *bona fide* administrative capacity within the usual meaning of such work and also within the definitions of the Administrator, except with respect to the limitation of $30 a week salary. It might have been wiser for Congress to have classified employees to be covered by the Act upon the basis of their earnings, or to have added with respect to administrative officers the additional requirement of a minimum salary, but it did not do so, and in my

opinion, the Administrator can not, by adding such requirement, which has no relation to the character of the work performed, bring within the scope of the Act a class of employees not intended. The fact that an executive may work for less than $30 per week or even $1 a year does not alter the fact that he is an executive."

V.

CONSTRUCTION OF EXEMPTION.

One contention of the petitioners is that the Court should not have measured the meaning of "area of production" by the dictionary, but should have permitted the Administrator's definition to stand because the Administrator conceived this to be the intent of Congress.

Unless the contrary appears, words of a statute are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them. *DeGanay* v. *Lederer*, 250 U. S. 376, 63 L. Ed. 1042; *U. S.* v. *First National Bank*, 234 U. S. 245, 58 L. Ed. 1298; *Billings* v. *United States*, 232 U. S. 261, 280, 58 L. Ed. 596.

The popular or received import of words furnishes the general rule for the interpretation of public laws. *Woolford Realty* v. *Rose*, 286 U. S. 319, 76 L. Ed. 1128; *U. S.* v. *Goldenberg*, 168 U. S. 95, 42 L. Ed. 594.

However, this Court has likewise announced that the words might not be given their ordinary grammatical construction if the sense be repelled by the intention or if they lead to absurd consequences. For example, see *Marks* v. *United States*, 161 U. S. 297, 301, 40 L. Ed. 706; *Ozawa* v. *United States*, 260 U. S. 178, 67 L. Ed. 199.

We then turn to a consideration of whether the ordinary grammatical construction of the phrase "area of production" is repelled by the intention of Congress or, in other words, if Congress used this phrase but clearly showed in the balance of the Act that it was not to be

construed according to its ordinary meaning. One might spend considerable time in discussing the other provisions of the Act on this question, but it is respectfully submitted there is nothing in the Act or in the Preamble to reach the conclusion that Congress did not mean "area of production" when it uses this phrase. By Section 13(a)(6) it is specifically excepted "any employee employed in agriculture" and after specifically excepting nine different classifications of employees, it added the exemption now under consideration, to-wit: Section 13(a)(10), which was an exemption to any individual performing certain designated operations "within the area of production (as defined by the Administrator)."

The Circuit Court of Appeals in the *Farmers Peanut Company* case, *supra*, said:

> "The word area means a surface, a territory, a region; in this case the territory or region where farm and orchard products are raised."

Congress did not say that in addition to being within the area of production, the individual must work in an establishment of a certain size (to be fixed by the Administrator). To follow the Administrator's construction of "area of production" would indeed lead to an absurdity. We would have a definite area where the product is commercially grown but according to the Administrator no company could physically be located in that area if it had more than seven employees. As said by Judge Waller in his special concurring opinion (R. 230):

> "There is no justification in the Act for restricting the canning or processing plant to any number of employees."

Under the Administrator's definition two plants might be located side by side in the very heart of a producing area—one has seven employees and is therefore entitled to the exemption under the Administrator's definition, but the other plant has eight employees and although located at

the same geographical spot, the Administrator would say that the second one is not within the area.

This Court in *Federal Trade Commission* v. *Raladam Company*, 283 U. S. 643, 75 L. Ed. 1324, adopted the language of Mr. Justice Field in *How Ah Kow* v. *Nunan*, Federal Case 6546, as follows:

> "The statements of supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied."

The Circuit Court of Appeals of the Fifth Circuit in *Fleming* v. *A. H. Belo Corporation*, 121 F. 2d 207, 213, stated that legislation is compromise and that the view of the proponents and opponents are in fact of little value in the construction of the Act, finding:

> "* * * that it is settled law that statutes must be construed in accordance with the intent of the legislation as expressed in the language of the Act as a whole."

However, if this Court should follow petitioners' contention that the phrase "area of production" is ambiguous and look to the history of the legislation for assistance or if the history of the legislation is studied to try to determine whether the phrase "area of production" should be given its ordinary grammatical construction, it is significant to note that the first concept of "area of production" was in an amendment proposed by Senator Schwellenbach, which read:

> "the term 'person employed in agriculture' as used in this Act, insofar as it shall refer to fresh fruits or vegetables, shall include persons employed within the area of production engaged in preparing, packing or storing such fresh fruits or vegetables in their raw or natural state" (C. R., July 30, 1937, p. 10179).

Following this proposal, a discussion took place on the Senate floor in which the following was said:

"Mr. Connally: The effect of the amendment is to exempt all employees of apple-packing plants; is it not?

Mr. Schwellenbach: If they are engaged in the area of production and so long as apples are in their natural or raw state; yes, sir.

Mr. Connally: Mr. President, I should like to ask the Senator from Washington a question. Would not the effect of his amendment be to exempt all industrial warehouses and packing plants in apple territories? There is no limit. The condition is that they are packing plants, and if they are, they are exempt.

Mr. Schwellenbach: If a packing plant is working upon fresh fruits or vegetables, in their raw or natural state, within the immediate production area, it would be exempt.

Mr. Connally: My understanding is that the largest apple packing plant in the world is located at Winchester, Virginia, right in the heart of a great apple-producing region. That would be exempt, would it not?

Mr. Schwellenbach: If the work done in that plant is as described in the amendment, it would be exempt."

(C. R., July 30, 1937, pp. 10179, 10189, 10181.)

Probably there is no better means of ascertaining what Congress intended to do than to realize that amendments were offered doing exactly what the Administrator had done, to-wit: limiting the number of employees, *and these amendments were rejected.*

In C. R., July 27, 1937, p. 9910, we find that Senator Reynolds suggested an amendment exempting employers of ten or less employees and on July 30, 1937 (C. R., p. 10166), the Senator offered an amendment providing for an exemption of employers employing ten or fewer than ten persons, but on July 30, 1937 (C. R., p. 10191), *this amendment was rejected.*

Another amendment was proposed by Senator Reynolds exempting from the provisions of the Act employers of five or fewer than five persons and *this amendment was likewise rejected* (C. R., July 31, 1937, p. 10266).

From the above it is quite clear that neither the author of the phrase "area of production" nor the Senate had in mind any limitation as to number of employees because the Senate passed the bill on July 31, 1937, with Mr. Schwellenbach's amendment with reference to area of production and after it had *rejected* the idea of any limitation as to number of employees.

It is very clear from the study of the legislative history and the Act itself, that Congress intended that the area of production should mean a geographical area. As to this, there seems to be no dispute on the part of anyone. Therefore, using this test, does the number-of-employees factor injected into the definition bear any reasonable relationship to the geographical area of production wherein the particular agricultural commodity is being produced? For instance, did Congress intend that an employee performing the excepted services on citrus in the very heart of the citrus producing area of Florida be not exempt because he has ten co-employees while an employee having nine co-employees in an establishment on the outer fringe of the area of production would be exempt? Undoubtedly, it was intended by Congress that both such employees should be exempt. The Act specifically exempts "any employee employed in agriculture"; see Section 13(a)(6), then, and in addition thereto, a further exemption was provided under Section 13(a)(10). By the agricultural exemption, services performed by a farmer or on a farm as an incident to farming operations are exempt. Congress intended that there be further exemptions, not only to the farmer or to the person working on the farm but to persons performing certain specified services on agricultural commodities after these commodities left the farm. Clearly there was no intention or desire to exempt such services if they were performed in an in-

dustrial area as distinguished from the production area. Therefore, Congress said that, in addition to the services of the farmer or services on the farm, employees performing certain designated services on the agriculutral commodity would likewise be exempt if those services were performed within the "area of production." It is not conceivable that there was ever any idea that the Administrator would so delimit the definition as to exempt the same labor that was included under the agricultural exemption. It was never thought that the Administrator would attempt by such a narrow definition to force a small packing house to limit the volume of the agricultural commodity handled so as to use fewer employees or to increase its costs to be borne by the farmer.

During the short time the Act has been in force and effect, the Administrator has issued six different definitions or amendments defining "area of production." Admitting that Congress placed upon his shoulders a difficult task, it is certainly not conceded that "area of production" is indefinable. Attached hereto as an appendix will be found the several definitions or amendments. A casual reading of these regulations will show clearly that the Administrator has at all times approached the problem with a definite idea of delimiting the exemption granted by Congress to the "nth" degree. They clearly show there is and has been no effort to carry out the legislative intent but clearly an effort to limit the exemption to the fewest possible number of persons.

The regulations can not be arbitrary or capricious and the administrative agent is only to supply the details within the framework of the standards established by Congress. *Currin* v. *Wallace*, 306 U. S. 1, 83 L. Ed. 441.

United States v. *Shreveport Grain and Elevator Company*, 287 U. S. 77, 77 L. Ed. 175, 179. This Court quotes from *U. S.* v. *Hartwell*, 6 Wall. 385, 396, 18 L. Ed. 830, 832, as follows:

"If the language be clear, it is conclusive. There can be no construction where there is nothing to construe."

In that case, committee reports were urged but the court said:

"In proper cases such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms."

In *Manhattan General Equipment Company v. Commissioner of Internal Revenue*, 297 U. S. 129, 80 L. Ed. 529, 531, this court say:

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Lynch* v. *Tilden Produce Co.*, 265 U. S. 315, 320-322, 44 S. Ct. 488, 68 L. Ed. 1034-1036; *Miller* v. *United States*, 294 U. S. 435, 439, 440, 55 S. Ct. 440, 79 L. Ed. 977, 980-981, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. *International R. Co.* v. *Davidson*, 257 U. S. 506, 514, 42 S. Ct. 179, 66 L. Ed. 341, 346."

The Supreme Court has also said of regulations that they "become, in deed, binding rules of conduct, but they are valid only as subordinate rules and when found to be within the framework of the policy which the Legislature has sufficiently defined." *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 427-429, 79 L. Ed. 446, 463, 55 S. Ct. 241, 252.

We do not question that portion of the Administrator's definition of "area of production" which requires that the

exempt operations be performed upon "materials, all of which come from farms in the general vicinity of the establishment," where the employee is employed (although we do not think that this portion of the definition lays down a guide much clearer than that furnished by the language of Congress), but only that portion of the definition which limits the exemption to an employee employed in an establishment which does not employ more than seven employees.

The word "production" is used in connection with agricultural and horticultural commodities and the reference in Section 13(a)(10) is to the production of such commodities. The "area of production" is the area in which the farms are located on which each commodity is produced. In general the word "area" means any plane surface or surface space. In this particular connection it means a portion of the surface of the earth. There seems to be no justification for giving it any other meaning, and in the particular connection in which it is used it means that portion of the surface of the earth within which the farms are located on which the agricultural or horticultural commodity in question is produced.

Within the power given by Congress, the Administrator might properly be allowed by the courts a broad latitude, even though the area ascertained by him to be that in which a particular commodity is produced may not exactly correspond with the court's idea as to that area. Clearly, however, he would have no power and was not intended by Congress to have the power to make any definition which would exclude from the Congressional exemption an employee conclusively proved to be engaged in exempt operations in the very heart of the producing area.

To uphold the Administrator's limitation based upon the number of employees is to say that Congress intended that the Administrator could nullify the very exemption it was granting. In other words, it would be

the same as saying that Congress intended to empower the Administrator to say that an employee engaged in exempt operations in the area of production was not exempt from the Act, although Congress expressly said that he was. The Administrator's contentions in this respect boil themselves down to the ridiculous proposition that Congress said in Section 13(a)(10) that it thought the operations there specified, if performed in the area of production, should be exempt, but that the Administrator could refuse to exempt these operations if he saw fit. Nothing is more clear than that the Administrator has sought to do exactly this.

Perhaps it is unnecessary to cite any authority to show that the definition of the Administrator is not authorized by a grant of the power to define "area of production," in view of the clear proof in the case at bar that the employees in question are engaged in exempt operations in the heart of the citrus producing area. However, we would like to call attention to the decision in the case of *Lukens Steel Company* v. *Perkins*, (Ct. of App. D. C., 1939) 107 F. 2d 627, in which it was held that the word "locality" could not, under the context of the statute there involved, be defined by an administrative agent to include "an area consisting of 13 states, a portion of the 14th, and the District of Columbia as well." The statute there involved was the Public Contracts Act of June 30, 1936, 41 U. S. C. A., Sec. 35, *et seq.*, which required that in certain contracts entered into with the United States there should be included a stipulation that the contractor would pay all persons employed by him in carrying out the contract "not less than the maximum wages as determined by the Secretary of Labor to be the prevailing maximum wages for persons employed in similar work or in the particular or similar industries or groups operating in the locality in which the materials, supplies, articles or equipment are to be manufactured or furnished under said contract." The Court said:

"It is true that the word *locality* is one of somewhat indefinite meaning. Still, its indefiniteness has certain well recognized limits in common meaning and usage, which exclude and forbid the interpretation placed upon the word by the appellees in their determination. It is true that within the proper limits of the meaning of *locality*, the Secretary is required by the statute to exercise judgment and discretion; but the determination in this case goes so far beyond any possible proper application of the word as to defeat its meaning and to constitute an attempt arbitrarily to disregard the statutory mandate. The rule therefore—that where the adoption of one of several possible interpretations of a doubtful statute involves the exercise of judgment and discretion, upon which the duty of an officer to perform a particular act depends, the courts cannot control the exercise of that discretion—has no application in the present case."

This decision was reversed by the Supreme Court of the United States, 310 U. S. 113, 60 S. Ct. 869, on the ground that no justiciable controversy was presented, but the Supreme Court did not pass upon the question decided by the Court of Appeals for the District of Columbia as to the actual authority of the Secretary of Labor to define the word "locality" as she did. We submit that this decision is correct and thoroughly in accord with legal precedents as applied in a justiciable controversy such as the case at bar.

The case of *Gray* v. *Powell*, 314 U. S. 402, 411, 86 L. Ed. 309, 62 S. Ct. 326, is cited by petitioners for the proposition that the validity of the Administrator's definition cannot be reviewed does not support that position. In that case the Act provided that any person who believed that his commerce in coal was not subject to the provisions of Section 4 of the Bituminous Coal Act of 1937 might file an application for exemption and have a hearing before the Commissioner on the exemption. It further provided that any person aggrieved by an order of

the Commission could appeal to the courts but that "the finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." The question involved in the case was whether the particular party seeking exemption was a "producer" within the meaning of the Act. The Commission held that under the evidence, which was uncontradicted, the applicant was not a producer and therefore was not exempt. The Court said:

> "In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here, §§4—II(1) and 4-A, the function of review placed upon the courts by §6(b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body and an application of the statute in a just and reasoned manner."

The Court then went on to discuss the evidence and to hold that it supported the decision of the Commission. Here the Court recognized what has always been true, that the ruling of the particular administrative body must be an *application of the* statute and that it must be *just and reasoned.* In the case at bar we do not have a situation where there was afforded either the employer or his employees an opportunity to be heard as to whether or not his operations were exempt from the Act, but on the other hand we have a general definition published *ex parte* containing a limitation which is no *application of the statute.*

Nor does the case of *U. S.* v. *Bush & Co.*, 310 U. S. 371, 84 L. Ed. 1259, 60 S. Ct. 944, support the position of petitioners. In that case the Court was dealing with the validity of a change in customs rates by a proclamation of the President under Section 336(c) of the Tariff Act of 1930, 19 U. S. C. A., Sec. 1336(c), which provided that the President "shall by proclamation approve the rates of duty and changes in classification and in basis of value

specified in any report of the Commission under this Section, if in his judgment such rates of duty and changes are shown by such investigation of the Commission to be necessary to equalize such differences in costs of production." The party attacking the Presidential proclamation contended that the Tariff Commission had used an erroneous basis for determining the rate of foreign exchange necessary to be considered in arriving at the basis for the changes in rates and that the Presidential proclamation changed the rates in accordance with the report of the Commission arrived at upon this erroneous basis. The Court pointed out that the Commission was acting only as advisor to the President in making its report and that under the express provisions of the Act the President was authorized to change the rates *if in his judgment* the changes were necessary to equalize the differences in the domestic and foreign costs of production. It was pointed out that the powers so entrusted to the President were not essentially different in kind from those which have been granted him under the Tariff Acts for well over a century and that "the statute constitutes him the sole and exclusive judge of the existence of those facts," which were the basis of the exercise of the discretionary power expressly granted to him. It is clear from this decision that the President was acting under the terms of an expressly delegated power and in pursuance to the power so delegated; whereas, in the instant case the Administrator has assumed to himself a power not delegated by the authority to define "area of production." The Fair Labor Standards Act did not purport to give the Administrator the discretionary power as to whether or not he would define the words "area of production" nor did it give him the power to define it and then to provide that it should not apply to employees engaged in plants having more than seven employees.

All of the cases to the effect that Congress may delegate the power to issue regulations to have the force and

effect of law clearly show that the exercise of the power delegated must, in order to be valid, be within the policy expressed by Congress in the enactment of the law. If regulations issued pursuant to Congressional authority run counter to the terms or policy of the statute, they are void. See especially *U. S. v. Shreveport Grain and Elevator Co.*, 287 U. S. 77, 77 L. Ed. 175, 53 S. Ct. 42; *U. S. v. Grimaud*, 220 U. S. 506, 55 L. Ed. 563, 31 S. Ct. 480. The same authorities indicate that it is only where such regulations come within the scope of the Congressional authorization that "the courts have consistently refused to interfere with legislative judgment entrusted to administrative officers."

VI.

FINDINGS OF LOWER COURT.

There is no real conflict in any findings of fact between the District Court and the Court of Appeals in this case. The District Court failed to realize separate seasons and separate definitions were involved and did not make a specific finding as to the locality where the fruit was obtained. The trial court held as a mattor of law that the number of employees limitation was valid, and this decided the point involved—definitely placed the employee outside the area of production and therefore not entitled to exemption. The Court of Appeals differed in this conclusion of law and then made findings as to the locality from which the commodity was obtained and applied the particular facts of the case.

This Court in *Continental-Illinois v. C. R. I. & P. R. Co.*, 294 U. S. 648, 79 L. Ed. 1110, held that the concurrent findings of both courts below should be accepted as conclusive unless clearly erroneous, citing numerous authorities.

VII.

ADMINISTRATOR'S HEARINGS.

Petitioners in their Brief refer to the record of the administrative hearings by his representative, Merle D. Vincent, to ascertain the factual basis for such definitions. Mr. Vincent's findings and recommendations were rendered on March 14, 1939. He points out that the scope of the hearings was "what, if any, amendment should be made of Section 536.1 or Section 536.1 of the regulations issued under the Fair Labor Standards Act of 1938 in respect with the definition of 'area of production' for fresh fruits and vegetables." Then he emphasized the fact that the breadth of the problem was reflected in the widely representative capacity of the persons who appeared at the hearing. His findings consist of approximately thirty-four pages and his recommendations of one page.

There is contained in the findings:

> "In Florida, where the citrus acreage is spread over a large part of the state, average hauls are frequently longer and maximum hauls go up to two hundred and fifty miles in some cases."
>
> "In Florida, the normal, rather direct movement from farm to nearby packing house is somewhat distorted in some instances by a choice of packing house with reference to further shipment."
>
> "The important Florida citrus canning industry, operating for about six months a year, procures part of its citrus direct from the groves and part from packing houses. There are only fifty citrus canneries in the state in comparison with three hundred and fifty packing houses; accordingly some fruit is hauled to the canneries over two hundred miles and the average haul is longer than the haul to the packing house."
>
> "While there may be some home canning with equipment operated by 7 or fewer persons, it is

the opinion of all witnesses that any commercial cannery must employ a greater number of persons. The actual number of employees varies greatly" (This is the only reference to the number of employees limitation).

"The definition to be adopted must therefore be directed toward the relation of the plant to the farmer with the three qualifications of (1) geographical immediacy, (2) rural character of the community in which the plant is situated, and (3) relation of cost factors to the farmer's income for his produce."

His recommendations are that Section 536.2 of the Regulations issued under the authority of Section 13(a)(10) of the Fair Labor Standards Act of 1938 be further amended by the addition thereto of the following:

"(e) With respect to perishable or seasonal fresh fruits and vegetables, if he is engaged in handling, packing, drying, storing, preparing in their raw or natural state, or canning such products for market in an establishment which is located in the open country or a rural community, and obtains its products from farms in its immediate locality and performs such operations for the account of the grower of such products.

"As used in this sub-section (e) 'open country or a rural community' shall not include any city of twenty-five thousand or greater population according to the 15th United States Census, 1930, and 'immediate locality' shall not include any distance more than fifty miles, provided, however, that if the establishment is located in a somewhat larger city or obtains the products from a somewhat greater distance, and the nature of the business and the type of operations are similar to those in competitive establishments included within the 'area of production' under this sub-section, the Administrator may determine that such establishment is also in the 'area of production' on the basis of an individual application.'

With these recommendations before the Administrator, he issued his regulation of April, 1939, changing the rec-

ommendation of the twenty-five thousand population to twenty-five hundred and cutting down the recommendation of the fifty-mile haul to ten miles.

There is a line of authorities holding in effect that it will be presumed that the administrative agent made the necessary findings of fact to warrant the issuance of the regulation. This is not true in this case because (1) the number of employees element in the limitation is contrary and in direct conflict with the language of Congress—with the framework in the established standards and (2) the record of the hearings shows conclusively that no evidence was taken on this point and no findings made.

Before concluding there are one or two points set forth in Petitioner's Brief which really need no answer, but we call them to the attention of the Court.

Petitioners devoted part of their brief to the portion of the regulation with reference to cities of twenty-five hundred or less and the ten-mile haul. The validity of this regulation was not passed upon by the Circuit Court of Appeals.

Petitioners likewise call attention to the fact that the Court of Appeals stated that:

> "* * * a distance of twenty-five miles in this day of highly developed travel facilities is not beyond the range of usual farm travel" (R. 227);

that the District Court said:

> "An appreciable portion (of the commodities or materials processed) came from a distance beyond the range of usual farm travel" (R. 192).

In the answer this Respondent alleged "the result of this integrated development of citrus is that the usual range of farm travel is great, many producers owning grove properties more than 100 miles distant, but belonging to a cooperative or customarily dealing with a

single independent handler in proximity to one of such grove properties, and producers and handlers alike are competitors and neighbors, meeting in common markets and under common conditions to bid against one another for a single labor supply or a single price or to exchange solutions of their common problems though their groves or their establishments may be more than 100 miles apart" (R. 14). *The Petitioners stipulated that the allegations were true and correct* (R. 144).

Petitioners take the position that, if the Administrator's definitions are invalid, then no exemption exists under Section 13(a)(10). Neither of the lower courts held the definitions invalid *in toto*, and therefore, such contention is inapplicable in this case.

> "Every part of a statute must be construed in connection with the whole so as to make all parts harmonious, if possible, and give meaning to each." *Washington Market Company* v. *Hoffman*, 101 U. S. 112, 116, 25 L. Ed. 782; *Ex parte Public National Bank*, 278 U. S. 104, 73 L. Ed. 202; *Ruff* v. *Gay*, 67 F. 2d 684; *Jones* v. *York County*, 47 F. 2d 837, and *Berry* v. *Atlantic Greyhound Lines, Inc.*, 114 F. 2d 255.

Applying these general principles, it naturally follows that the Court must give some meaning to Section 13(a)(10) and the only logical meaning is that there must be exemption from the Wages and Hours Provision of the Act. This exemption is to those who are performing the specified services within the "area of production." Congress instructed the Administrator to define "area of production." If any court should hold his entire definition invalid, then there is no definition of "area of production" and the Court must apply the exemption to the stated facts in the particular case.

VIII.

CONCLUSION.

It is respectfully submitted to the Court that the striking of the number of employees element from the definition of the Administrator by the Circuit Court of Appeals does not present a case in which the powers of this Court should be exercised in granting a writ of *certiorari*. The question does not fall within any of the considerations set forth in Rule 38 of this Court nor within the grounds relied upon by Petitioners.

Respectfully submitted,

R. B. HUFFAKER,
C. O. ANDREWS, JR.,
COUNTS JOHNSON,
G. L. REEVES,
Attorneys for Respondent.

R. B. HUFFAKER,
Bartow, Florida,

C. O. ANDREWS, JR.,
DeVane, Andrews & Patterson,
Orlando, Florida,

COUNTS JOHNSON,
Florida Citrus Exchange,
Tampa, Florida,

G. L. REEVES,
Sutton, Reeves & Allen,
P. O. Box 2111,
Tampa, Florida,
Of Counsel.

APPENDIX A.

Definitions of Area of Production.

(1) The Administrator promulgated on October 20, 1938, Section 536.2 of the Regulations, purporting to define "area of production" as follows:

> "Section 536.2 'Area of Production' As Used in Section 13 (a) (10) of the Fair Labor Standards Act. An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10), in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products,
>
> (a) if he is engaged in such work on a farm and on agricultural or horticultural commodities produced exclusively on such farm, or
>
> (b) if the agricultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediate locality and the number of employes in such establishment does not exceed seven."

(2) That regulation remained in effect through April 19, 1939, when (following a series of administrative hearings,) he promulgated, effective April 20, 1939, an additional paragraph to said Regulation 536.2, as follows:

> "(e) with respect to perishable or seasonable fresh fruits and vegetables, if he is engaged in handling, packing, storing, drying, preparing in their raw or natural state, or canning such products for market in an establishment which is located in the open country or in a rural community and which obtains all of its products from farms in its immediate locality. As used in this subsection (e) 'open country' or 'rural community' shall not include any city or town of 2,500 or greater population according to the 15th

United States Census, 1930; and 'immediate locality' shall not include any distance of more than 10 miles."

(3) On June 15, 1939, effective June 17, 1939, the Administrator again amended said Regulation, as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10), in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(a) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven, or

(b) with respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this subsection (b), 'first concentration point' means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment normally receiving a portion of the beans assembled from other first concentration points, or

(c) with respect to Puerto Rican leaf tobacco, if he is engaged in handling, packing, storing, and drying such tobacco for market in an establishment which is a first concentration point for such tobacco. As used in this subsection (c), 'first concentration point' means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing, or

(d) if he performs those operations on materials all of which come from farms in the immediate locality of the establishment where he is employed

and the establishment is located in the open country or in a rural community. As used in this subsection (d), 'immediate locality' shall not include any distance of more than ten miles and 'open country' or 'rural community' shall not include any city or town of 2500 or greater population according to the 15th United States Census, 1930."

(4) On July 23, 1940, effective October 1, 1940, the Administrator again amended said Regulation as follows:

"II. An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10), in handling, packing, storing, drying, preparing in their raw or natural state, or canning of perishable or seasonal fresh fruits or vegetables for market:

if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten."

(5) On March 12, 1941, effective April 1, 1941, the Administrator again amended said Regulation as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products;

(a) If he performs those operations on materials all of which come from farms in the general vicinity of the establishments where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten, or

(b) with respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this sub-section (b), 'first concentration point' means a place where such

beans are first assembled from nearby farms for such processing but shall not include any establishment normally receiving a portion of the beans assembled or from other first concentration points, or

(c) With respect to Puerto Rican leaf tobacco, if he is engaged in handling, packing, storing, and drying such tobacco for market in an establishment which is a first concentration point for such tobacco. As used in this sub-section (c), 'first concentration point' means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing."

(6) On October 6, 1941, effective January 5, 1942, the Administrator again amended said Regulation, as it is now currently in effect, as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market; or in making cheese or butter or other dairy products:

(a) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten, or

(b) with respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this subsection (b), 'first concentration point,' means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment normally receiving a portion of the beans assembled from other first concentration, or

(c) with respect to Puerto Rican leaf tobacco, if he is engaged in piling, bulking, or otherwise handling unstripped tobacco for market in an establishment which is a first concentration point for such tobacco; provided that employees engaged in stripping tobacco or engaged in piling, bulking, or otherwise handling stripped tobacco shall not be deemed to fall within this definition. As used in this subsection (c), 'first concentration point' means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing."

APPENDIX B.

In the District Court of the United States for Puerto Rico
Rafael Bruno et als, Plaintiffs vs. Hills Bros. Co. of Puerto Rico Defendant Civil No. 2210

Opinion.

Defendant is a corporation engaged in farming in Puerto Rico and in the packing and canning of citrus fruit and in the processing of certain other fruits and vegetables. This suit was brought by its employees for wages, overtime and liquidated damages alleged to be due them by reason of the failure of defendant to comply with the provisions of the Fair Labor Standards Act.

The facts in this case were not in dispute and were set out in considerable detail in a Stipulation of Facts dated June 12, 1943 and filed with the Court at the opening of the trial on June 14, 1943. The plaintiffs rested on that Stipulation and the defendant produced some additional evidence relating to the nature of the canning business in Puerto Rico and on other points in the case. The pertinent facts to the decision of this case are set out in the Findings of Fact filed this day.

In addition to farming, the defendant did a number of operations on different fruits and vegetables, some of which were exclusively from its own farms and others of which were purchased from farms in the general vicinity of defendant's canning and packing plant.

During the period covered by the Complaint, the defendant engaged periodically in the canning and packing of grapefruit, all of which came from its own farms, except for a period of twelve days in the year 1940, during which period it purchased some grapefruit from other farmers in the general vicinity; in the canning of pineapples purchased from other farmers; in the canning of

gandules (pigeon peas) purchased from other farmers; in the drying and shredding of coconut purchased from other farmers and in the curing of citron, all of which came from the farms of defendant itself except for a quantity purchased from one other grower.

Under the Stipulation filed, the only question to be determined was whether or not the employees of defendant, during the period covered by the Complaint, fell within the terms of the federal Fair Labor Standards Act of 1938. The question of the amount due, if any, to the plaintiffs by the defendant on account of unpaid wages and liquidated damages, was left pending as a result of the primary determination on coverage.

In the first place, except as to grapefruit and citron, there was no proof offered to show that any of the fruit and vegetables processed by defendant went into commerce as alleged in the Complaint. The questions stressed by both plaintiffs and defendant in the Stipulation and argument related to the area of production exemption in Section 13-a-10 of the Fair Labor Standards Act of 1938, and the definition of "agriculture" in Section 3(f) of the Act and the corresponding exemption in Section 13-a-6. These sections referred to, read as follows:

> "Sec. 3. . . .
>
> "(f) 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

"Sec. 13. (a) The provisions of Sections 6 and 7 shall not apply with respect to . . . . (6) any employee engaged in agriculture . . ."

"Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect . . . . (10) to any individual employed within the area of production (as defined by the Administrator) engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products."

As regards canning and packing of grapefruit and the curing of citron which are raised by defendant on its own farms, it seems clear to me that the provisions of Section 3(f) and of Section 13-a-6 quoted above, relieve the defendant of any liability under the Act, except as to the period of twelve days during which the defendant canned grapefruit purchased from other farmers and the period during which it cured citron purchased from one other farmer. So far as the work done on its own products is concerned, this was work "performed by a farmer" on its own farm as an incident to its farming operations and consisted in the preparation of these products for the market. Such operations are specifically excluded from the Act. In any event if such operations were not exempt by Section 13(a)(6) they were certainly exempt under Section 13(a)(10) being clearly within the area of production under any valid definition.

There was a period of twelve days, from February 28, 1940 to March 13, 1940, when defendant canned some grapefruit purchased from others. This fruit came almost entirely from Sabana Llana, the same ward of Rio Piedras in which defendant's canning plant is located and from Bayamón, a municipality formerly contiguous to Rio Piedras, now separated by the municipality of Guaynabo formed from parts of Rio Piedras and Bayamón. (Paragraph 1 of Stipulation and Exhibit A). While such op-

erations on purchased grapefruit would not fall within the exemption of 13-a-6 and 3(f), the grapefruit came from the general vicinity of the defendant's farm and place of business (in fact from the immediate locality, and in view of the conclusions to which I have arrived in regard to the Administrator's definition of "area of production", such canning was exempt under Section 13-a-10. The same may be said in general as to citron purchased from another farmer and cured by defendant, it came from the general vicinity of defendant's farm where it was brought to be cured.

As regards the processing operations of the defendant performed on agricultural and horticultural products purchased from other farmers (pineapples, peas and coconuts) the question arises as to whether such operations were exempt from the Act under Section 13-a-10. This section states an exemption to an individual employed in the operations in which defendant was engaged, but in such case the Act requires that in order to be exempt the individual must be employed within the area of production as defined by the Administrator.

The Administrator has apparently found considerable difficulty in defining "area of production", since this definition has been changed several times. The first definition dated October 20, 1938, defined "area of production" to require that the men be employed on a farm and at work on commodities produced exclusively on that farm or if the products came from farms in the immediate locality that the number of employees in the establishment did not exceed seven. An amendment immaterial here was made December 21, 1938. Then, on April 19, 1939, an additional definition was made with respect to perishable or seasonable fresh fruits and vegetables, by adding paragraph (e) and this paragraph required that the establishment be in the "open country" or "rural community" not including any city or town of 2,500 or more population in 1930 and that the perishable or seasonable

products come from the "immediate locality" of the establishment, not over ten miles. There was no limitation on number of employees in the processing of perishable or seasonable fruits and vegetables. On June 17, 1939, the basic definition was changed from "immediate locality" to "general vicinity of the establishment" but the number of employees was still limited to seven. An alternative definition referred to farms in the immediate locality, where the establishment was located in the open country or in a rural community. The special paragraph relating to perishable fruits and vegetables was eliminated, but the same provisions were made applicable generally in the alternative definition.

On July 23, 1940 (effective October 1st, 1940), a further amendment was made and again on March 12, 1941 (effective April 1st, 1941) a still further change was made retaining the words "general vicinity" and placing the number of employees at ten or less. The last amendment was made October 6, 1941 (effective January 5, 1942).

The changes made from time to time in the Administrator's efforts to define "area of production" can perhaps best be seen from the following statement in tabular form:

Regulations Section 13-a-10	Processing of Fruit and Vegetables Done by Deft.
October 20, 1938 to April 19, 1939.	
a) If employee is working on a farm and on commodities produced exclusively on such farm, or	Feb. 20, 1938 - Jan. 6, 1939, canned pigeon peas.
b) If the commodities come from farms in the immediate locality and the number of employees does not exceed seven. (Amendment December 22, 1938 not material here).	Feb. 28, 1939 - Mar. 26, 1939, canned own grapefruit.

April 20, 1939 to June 15, 1939.	
a) Same.	
b) Same.	
c) Refers to dry beans.	
d) Refers to Puerto Rican leaf tobacco.	
e) Perishable or seasonable fresh fruit and vegetables	
Employee must be employed in an establishment located in the open country or rural community and products must come from farms in the immediate locality. Rural community must not include town of over 2,500 population and immediate locality does not include any distance over ten miles.	

June 16, 1939 to July 23, 1940 (Effective October 1st, 1940).	Feb. 28, 1940 - March 13, 1940, canned purchased grapefruit.
a) If employee is working on product which come from farms in the **general vicinity** and number of employees does not exceed seven, or	Feb. 16, 1940 - Apr. 6, 1940, canned own grapefruit.
	May 17, 1940 - August 9, 1940, canned pineapples.
	Jan. 29, 1940 - Feb. 21, 1940, canned pigeon peas.
d) If working on products from the immediate locality and the establishment is located in the open country or in a rural community.	Mar. 21, 1940 - Mar. 30, 1940, canned pigeon peas.
	June 5, 1940 - Oct. 24, 1940, processed coconut

Regulations Section 13-a-10	Processing of Fruit and Vegetables Done by Deft.
October 1st, 1940 to March 12, 1941 (effective April 1st, 1941)	Mar. 7, 1941 - July 11, 1941, canned pineapples.
Same definition in general, but reference to perishable fruits and vegetables again inserted with the same provisions as before except that the number of permissible employees has been raised to ten.	Feb. 7, 1941 - Apr. 4, 1941, canned own grapefruit.
	Dec. 22, 1940 - Mar. 12, 1941, canned "gandules".
	Oct. 25, 1940 - Nov. 20, 1940, processed coconuts.
	Dec. 11, 1940 - Dec. 25, 1940, processed coconuts.
	Jan. 21, 1941 - Feb. 5, 1941, processed coconuts.
	Between Oct. 25, 1940 - July 22, 1941, but not continuously, cured purchased citron.

April 1st, 1941 to date	
a) Definition remains general vicinity, but number of employees permissible raised to ten. References to perishable fruits and vegetables abandoned	Mar. 12, 1941 - Sept. 4, 1941, processed coconuts.
	The periods when defendant was curing its own citron raised on its own farms, are not specified.

The Administrator twice put in special provisions for perishable fruits and vegetables and twice abandoned them and on October 1st, 1940 had abandoned the idea of an alternative definition relating to rural communities or towns of not over 2,500 population under the 1930 Census as well as the ten-mile limit in the alternative definition.

Admittedly the defendant employed more than seven and more than ten workers in its establishment in the work done on fruit and vegetables purchased from other farmers, so that if the Administrator's definition is valid in its entirety and if the defendant were otherwise liable, it would not be exempt from the application of the Act to its employees under Section 13-a-10.

The Administrator was given the power to define "area", to make ineffective the intent of Congress. To change the statute nor under the guise of definition of "area," to make ineffective the intent of Congress. To define "area" in terms of number of employees seems to me a clear extra-limitation of his power by the Administrator. Area of production has nothing to do with number of workmen at a cannery or dairy or other establishment of that general nature. The word "area" means a surface or extent of territory, in this case the region or territory where the fruit or vegetables are produced. (*Fleming* vs. *Farmers Peanut Co.*, 128 Fed. (2) 404; *Holly Hill Fruit Products, Inc.* v. *Addison*, (C. C. A. 5) June 24, 1943.)

It is clear from a reading of the Fair Labor Standards Act of 1938 in its entirety that Congress not only intended to exempt farmers from the operation of the Act, but also to exempt them from the immediate effects of that Act. It intended to refrain and did refrain from adding to the farmer in the preparation and marketing of his crop the burdens or expenses which might be caused by the Act, and it is my opinion that Congress intended for the farmer to be able to reach his convenient and available markets and sell his products there without being burdened by the

Act. To allow the Administrator by definition to restrict the exemption to canning or processing plants employing seven or less or ten or less employees, would be to allow the Administrator to thwart the express will of Congress, and that part of the Administrator's definition of "area of production" has no basis either in law or in ordinary reason.

It also seems clear to me that the restriction embodied at times in the Administrator's definition to the effect that the establishment must be located in an open country or in a rural community and that the area must not include a town of over 2,500 population according to the 1930 Census, is invalid. Whether the establishment is in a city or in a rural community and whether that community contains a town of over 2,500 population, has nothing to do with area of production, and it is only the area of production that the Administrator is allowed to define.

It has been suggested that if the Administrator's definition is invalid, there is no definition of "area of production" and hence no exemption. But the same statement might be made as to this as I have made above in regard to the thwarting of the will of Congress by a limitation of the number of employees. It is inconceivable that the intention and will of Congress as expressed in the Act could be upset either by the failure of the Administrator to make any definition at all, or by his making an invalid definition. But we are not faced with a situation where the Administrator has failed entirely to define the area of production in accordance with the law. A part of his definition stated at times that the exemption shall apply if the materials come from farms in the immediate locality of the plant and not over ten miles and later stated that it would apply if the products came from the general vicinity of the establishment where the workmen are employed and while this latter may not be a precise definition, it is a legitimate and valid defining of "area". I am, therefore, constrained to hold that that part of the administrative definition of "area of produc-

tion" under Section 13-a-10 which limits the exemption to establishments employing seven or less (later ten or less) workmen, is not in accord with the Act and is void, as is also the limitation regarding location in open country or in a rural community. The remaining part of the definition in each case, i. e., that the products come from the immediate locality or from the general vicinity of the plant, is the entire definition so far as this case is concerned. *Holly Hill Fruit Products, Inc.* vs. *Addison, supra.*

In the present case, the valid part of the definition from October 20, 1938 to June 15, 1939 provided the exemption if the employee was engaged in working on commodities produced on the farm itself or if the commodities were obtained from farms in the immediate locality of the establishment. As to the curing of defendant's own citron for which a period is not specified, if it fell during such period, such operation would be exempt in any case and the same would apply to the operation of defendant in canning its own grapefruit from February 28, 1939 to March 26, 1939. The other operation performed by defendant during this period was the canning of pigeon peas from February 20, 1938 to January 6, 1939. The canning of pigeon peas by defendant is relatively unimportant, but in any event the only evidence in the case as to where these peas came from is to the effect that they were purchased by defendant at Rio Piedras, which is a distance of 3.3 kilometers from defendant's plant. I therefore hold that during this period all of the operations of defendant were exempt from the provisions of the Fair Labor Standards Act of 1938.

Effective June 17, 1939, the pertinent part of the definition of "area of production" under Section 13-a-10, was as follows:

> "a) If he performs those operations on materials, all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those oper-

ations in that establishment does not exceed seven . . ."

This was continued in substantially that form to date except that on April 1st, 1941, the number of permissible employees was raised to ten. The limitation regarding the number of employees being invalid, the question to be decided is whether or not the operations performed by defendant after June 17 were on commodities which came from the general vicinity of defendant's plant. I am of the opinion that they did. As remarked above, "general vicinity" is not a precise definition, but has to be defined itself in each case in accordance with the facts of the situation. Puerto Rico is itself a relatively small island and the area in which grapefruit is grown is roughly on the northern coastal plain and in the central part of that plain, that is, from the town of Loiza on the east to Arecibo on the west, with the heaviest production around Manati, Bayamón, Cataño and Rio Piedras. As regards the canning of grapefruit for other farmers during twelve days in 1940, it is clear from the evidence that this plant was the *only available cannery* which the farmers could use during those twelve days and that such canning was a salvage operation for the benefit of the farmers.

All pineapple canning operations by defendant were subsequent to June 17, 1939 and while the valid part of the Administrator's definition referred to "general vicinity."[6] It was also shown that during the periods when the defendant was canning pineapples, it was the only cannery operating in Puerto Rico which would can pineapple purchased from growers. The other canneries canned only their own product and would not can for independent growers. The area in which pineapple is grown in Puerto Rico is approximately the same as that in which grapefruit is grown except that pineapple are also grown in the municipalities of Corozal and Cidra which are further toward the interior of the Island, but still on the north slope of the chain of hills or mountains which run

east and west from one end of the Island to the other. All of these municipalities are connected with an excellent system of good roads and both the grapefruit-growing area and the pineapple-growing area are compact. Certainly in the ordinary concept of the term this area is the area of production of pineapples in Puerto Rico and defendant's plant is located well within that area, and it is clear also that under the Administrator's definition referring to general vicinity, all the pineapples came from the general vicinity of defendant's cannery. To hold otherwise in this case would be to go against the clear intent of Congress. It seems to me that "general vicinity" must be adapted to the circumstances in each case. Had there been a number of other canneries operating within the pineapple-growing area, the situation of the defendant in this case might have been different, but it is not necessary to pass on that question. In fact, considering the small size of Puerto Rico, the density of population, the complete network of roads, the preponderance of agriculture in the insular economy and the intense cultivation to which the land is subjected, it might very well be held that the entire Island of Puerto Rico in any event and in any case is within the general vicinity of any other part of the Island.

As regards the processing of coconuts done by the defendant, the situation varies from its other operations. Coconuts grow on the entire narrow coastal plain of Puerto Rico which borders the Island, but the coconuts processed by the defendant during the period covered by the Complaint are shown to have come from the area between Aguadilla on the northwest part of the Island to Loiza to the east, the largest amounts during the year 1940 coming from Loiza, which is between ten and fifteen kilometers to the east of defendant's plant. (Exhibit "D" attached to Stipulation of Facts). The only coconuts involved in the year 1940 which came from any considerable distance, was one shipment purchased from George Sanders in

Aguadilla. The remainder came from an area so close to defendant's plant as to be without doubt within the general vicinity. During the year 1941, the coconuts received and processed by defendant outside of what could be called immediate area, were a number of relatively small shipments from Aguadilla and Cabo Rojo and one shipment from Vieques, a small island belonging to Puerto Rico located off the east coast. During the five periods when defendant was engaged in shredding and drying coconuts, there was no other plant in the entire island which did this processing work and hence this was the *only plant available to farmers anywhere in Puerto Rico* for the sale of coconuts for this purpose. Under these circumstances I hold that all of the coconuts processed by defendant during the period covered by this Complaint came from the general vicinity of defendant's plant within the meaning of the law and the Administrator's definition, and that in any event the isolated shipments from Aguadilla and Cabo Rojo, and Vieques would not affect the exemption even if it could be held that some towns in the island are not within the general vicinity of defendant's coconut processing sheds.

The curing of citron was done, on the same land in which the citron was grown, except the quantities purchased by defendant from one grower whose farm is in Adjuntas, Puerto Rico. This purchased citron was transported to defendant's own farm and there cured. So far as the employees engaged in the curing of defendant's own citron on the farm are concerned, defendant was clearly exempt from the provisions of the Act by Section 13-a-6, coupled with the definition of "agriculture" in Section 3(f) and as to the purchase made from Antonio Saliceti at Adjuntas, I am of the opinion that this should be held to have come from a farm in the general vicinity of defendant's farm where the product was cured.

Due to the conclusions which I have reached in this case, it is not necessary to consider the exemption from

the provisions of Section 7 as regards seasonal operations, as provided in Section 7(c) of the Act. Under the facts of the case, a number of the operations performed by defendant and in which the plaintiff or some of them were employed, were seasonal in their nature and limited to such time as to bring such operations within the exemption from Section 7, but since I have reached the conclusion that all of the operations of defendant covered by the Complaint are exempt either under Sections 3(f) and 13-a-6 or under Section 13-a-10 of the Act, it is not necessary to discuss the provisions of Section 7(c).

Judgment will be entered for the defendant dismissing the Complaint.

San Juan, Puerto Rico, August 19, 1943.

(Sgd.) Robert A. Cooper
Judge

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 217.

WILMA E. ADDISON, ERNESTINE C. LYLES, EDGAR CAMPBELL, SALLIE BAKER AND LUTHER BLACK, PETITIONERS,

VS.

HOLLY HILL FRUIT PRODUCTS, INC., RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT.

R. B. HUFFAKER,
C. O. ANDREWS, JR.,
COUNTS JOHNSON,
G. L. REEVES,
Attorneys for Respondent.

Of Counsel:

R. B. HUFFAKER,
Bartow, Florida,

C. O. ANDREWS, JR.,
ANDREWS, PATTERSON & LAVIN,
Orlando, Florida,

COUNTS JOHNSON,
Florida & Oak,
Tampa, Florida,

SUTTON, REEVES & ALLEN,
P. O. Box 2111,
Tampa, 1, Florida.

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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 217.

WILMA E. ADDISON, ERNESTINE C. LYLES, EDGAR CAMPBELL, SALLIE BAKER AND LUTHER BLACK, PETITIONERS,

VS.

HOLLY HILL FRUIT PRODUCTS, INC., RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT.

I. OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is reported in 136 F. 2d 323, *Holly Hill Fruit Products, Inc.*, v. *Addison et al.*, and the opinion of the District Court is not reported but the findings are on pages 186-198 of the record and the final judgment is on pages 211-215 of the record.

II. STATEMENT OF THE CASE.

Rather than to attempt to point out the many inaccuracies or omissions in the statement of the case by the Petitioners, and believing the same does not give such a complete and fair statement as to enable this Court to a consideration of all the matters presented, Respondent states the case as follows:

A. Exemption Under Section 13(a)(10).

The Respondent is a cooperative corporation organized and existing under the cooperative laws of the State of Florida and engaged in the canning of citrus fruits at Davenport, Florida (R. 13, 224). Five of its employees instituted this suit in the United States District Court for the Southern District of Florida, for underpay, overtime and statutory penalties under Sections 6 and 7 of the Fair Labor Standards Act, 29 U. S. C. A. 201 *et seq.*, 52 U. S. Stat. 106 *et seq.*, for the two canning seasons 1938-39 and 1939-40 (R. 2, 225). However, it developed that the Respondent had at all times paid the minimum wage required by the Act and, therefore, the judgment did not include any underpay (R. 212-215). The Respondent, answering the complaint, contended that the wage and hour requirements of the Act (Sections 6 and 7) were not applicable to its employees for the two seasons involved because of the exception provided for by Section 13(a)(10) (Fifth Defense, R. 13, 225) and also filed other defenses consisting of a denial of the material allegations of the complaint (Second Defense, R. 7-10), claiming the benefits of the partial exemption from the hours provision of the Act as granted under Section 7(b)(3) (Third Defense, R. 10-12) and claiming the benefit of the total exemption for a limited time from the hours provision of the Act as granted under Section 7(c) (Fourth Defense, R. 12-13).

The District Court, after taking testimony on the issue of whether the employees were within the exception provided by Section 13(a)(10), ruled against the Respondent holding the employees were subject to the Act and without taking testimony ruled that the defenses setting up Sections 7(b)(3) and 7(c) were insufficient (R. 186-198) and entered final judgment for overtime, penalties and attorneys' fees (R. 211-215). The Respondent appealed to the Circuit Court of Appeals which held

(1) that the portion of the definitions by the Administrator of the Wage and Hour Division limiting to seven the number of employees in the establishment before it could be within the area of production and, therefore, entitled to the exception, was a void limitation, following its former decision in *Fleming* v. *Farmers Peanut Company*, 128 F. 2d 404; and

(2) applied the particular facts of the case to the definitions with the number of employees limitation deleted, and held that, under the particular facts, the operations of the employees, during the two seasons involved, were within the definitions, therefore within the exception and not covered by the Act (R. 224, 231).

Section 13(a)(10) of the Fair Labor Standards Act provides that Sections 6 and 7 of the Act shall not apply to an individual engaged in certain operations, including the canning of agricultural and horticultural commodities within the area of production (as defined by the Administrator). It is admitted that the employees were engaged in the operations described in Section 13(a)(10) and in the definitions and the sole question in this case was whether these activities were within the area of production as defined by the Administrator.

The Act went into effect on October 24, 1938, and the Administrator promulgated his first regulation (definition) defining area of production on October 20, 1938 (Appendix to this brief 75), which definition was

amended in April, 1939, and, thereafter, the Administrator redefined the phrase "area of production" from time to time (App. 75-79).

The season for the canning of citrus in Florida runs from approximately November 1st to June 1st of the following year (R. 187—Findings of the Court) and this suit involves the two seasons of 1938-39 and 1939-40. During these two seasons, the Respondent operated its establishment from November 14, 1938, to May 26, 1939, and from November 16, 1939, to March 30, 1940 (R. 187).

For the two seasons involved there was in effect the first definition of the Administrator, his amendment of April, 1939, and the second definition (App. 75).

In his first definition, he defined the territory from which the commodity was to be obtained as "immediate locality" and in the second definition as "general vicinity." Realizing the phrase "immediate locality" needed clarification, he issued an amendment providing that "immediate locality" should not include any distance of more than ten miles and that the establishment must be located within a town of 2,500 or less population. "Immediate locality" was not defined in the first definition and the equally ambiguous expression "general vicinity" was left undefined in the second definition and has, likewise, been undefined in all subsequent definitions including the current one.

The number of employees of the Respondent during the two seasons involved exceeded seven (the limitation in the definitions); the establishment of the Respondent was located in a small town of some 650 population; the services were admittedly in the operations excepted; and, therefore, the only points involved in this litigation are whether the limitation as to the number of employees in the establishment is valid and whether the commodities were obtained from the territory described in the regulations—that is, the validity of the limitations "immediate locality" and "general vicinity."

At the trial of the issue as to whether the employees were excepted under Section 13(a)(10), the employer produced evidence showing the distance of hauls of commodities upon which the employees worked during the two seasons involved (Exhibits F, G, H—R. 179-184—admission in evidence 116-117), and the employees offered no testimony on this issue. The trial court reached the opinion that the limitation as to the number of employees was valid in each of the definitions and, since the Respondent had more than the limit, the Respondent could never be within the area of production regardless of where it obtained its commodities and, therefore, made no findings as to the territory from which the Respondent obtained its commodities, other than to find that the testimony as to the distance of the hauls was based on a direct distance "as the crow flies" and not by the shortest road haul (R. 193). The Circuit Court of Appeals adopted the haul distances shown by the Respondent in its opinion (R. 226-228).

The Petitioners contended that the definitions must be construed to mean that *all* of the commodities must be obtained within ten miles of the establishment, which theory was followed by the trial court, although it failed entirely to recognize that the ten mile haul limitation affected a period of only 36 days—April 20, 1939, to May 26, 1939, but the Circuit Court of Appeals construed the regulation to mean that only *substantially all* of the commodities must be obtained within that territory (R. 227).

So far, in this statement of the case, we have covered only that part of the case having to do with the exception provided under Section 13(a)(10) and this was the only portion of the case considered by the Circuit Court of Appeals in its opinion.

As stated above, the Respondent plead sections 7(b)(3) and 7(c) of the Act and, likewise, contended that the Act must be applied by the workweek and, in order to clearly present this last point, offered two additional

defenses: the first one denying that the appellant was subject to the Act during each and every of the workweeks involved and the second additional defense contending that the Respondent was within the exception provided by Section 13(a)(10) during each and every of the respective workweeks because it was within the area of production in the respective workweeks (R. 23-27). The trial court permitted the filing of the additional defenses but immediately sustained a motion to strike the same (R. 209).

B. Exemption Under Section 7(c).

In the Appendix to this brief (pages 81-82) will be found a complete copy of Section 7 of the Act. Section 7(c) provides for what is generally termed as the total 14 workweeks exemption—that is, an exemption for not to exceed 14 workweeks in any calendar year from the maximum hours provisions of the Act to the employees where an employer is engaged in canning perishable or seasonal fresh fruits and vegetables.

It should be borne in mind that the part of Section 7(c) "or in the first processing, within the area of production (as defined by the Administrator)" is not involved in this defense. Respondent claims the 14 workweeks exemption by reason of its operations in canning of seasonal or fresh fruits and not by reason of first processing. Therefore, the definition of area of production by the Administrator has nothing whatsoever to do with this claimed exemption and the definitions are involved in this case only in connection with Section 13(a)(10).

No testimony was taken on this issue which was set up in the fourth defense (R. 12) and stricken by the Court in his order of January 6, 1943 (R. 198), without granting leave to amend. The reasons for striking the same appear in paragraph F of said order (R. 200). The Circuit Court of Appeals did not pass on this point because it ruled that the Respondent's operations were not

under the Wage and Hour Act. Should this Court reverse the Circuit Court of Appeals and hold the operations were subject to the Act, this issue will then become important and this Honorable Court might, under its former decisions, refer the case back to the Circuit Court of Appeals to pass on this issue or, according to some of its decisions, might decide the point. Respondent was not in position to petition for certiorari on this issue in the case because the Circuit Court of Appeals did not pass upon it.

C. Exemption Under Section 7(b)(3).

This provision will be found in the Appendix to this brief (page 82). It grants a partial exemption from the overtime provisions of the Act not to exceed 12 hours a day or 56 hours a week for a period or periods not more than 14 workweeks in any calendar year in an industry found by the Administrator to be of a seasonal nature. The Administrator made a determination that the canning of citrus fruits was of a seasonal nature but this determination was not made until August, 1940, a date subsequent to the seasons involved in this case. The Respondent contended that if the operations during the two seasons were subject to the Wage and Hour Act, it was entitled to the benefit of Section 7(b)(3) (R. 10) but the Court struck this defense (R. 198-201) solely on the ground that the exemption did not exist until the Administrator had made his findings (R. 199).

What we have said under "Exemption Under Section 7(c)" with reference to a determination of that issue, is likewise applicable in all respects to the claimed exemption under Section 7(b)(3).

III. ARGUMENT.

SUMMARY.

Respondent, after explaining in a preliminary statement certain phrases and expressions to be used hereinafter, will develop its argument in the following manner:

1. Exception Under Section 13(a)(10).

This point is the main issue in this case and it shall be discussed as follows: (a) facts—a concise statement of the facts on this issue will be set forth; (b) the intent of the Congress will be shown from the provisions of the Act including the preamble and from the legislative intent; (c) the authority and the extent of the power of the Administrator will be discussed; (d) the applicable definitions and the amendment will be set out in a table and the same will be generally discussed; (e) the extent of the review of these definitions by this Court will be summarized, citing some of the former decisions of this Court and the Circuit Courts of Appeals announcing the applicable principles; (e-1) it will be shown that the definitions are so vague and indefinite as to deprive the Respondent of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States; (f) all of the cases which have dealt with this exemption will be clarified as to the conclusions reached; (g) the findings of the District Court in this case will be discussed and it will be shown wherein said findings and conclusions of law are clearly erroneous; (h) a few points in Petitioners' brief will be discussed; and (i) will be a discussion of the proper elements to be considered by the Administrator of the Wage and Hour Act in defining area of production.

2. Partial Exemptions Under Sections 7(c) and 7(b)(3).

Under this heading these partial exemptions will be discussed showing how the same are involved in this litigation and setting forth the contentions of the Respondent.

PRELIMINARY STATEMENT.

For convenience, throughout this brief, certain phrases and expressions will be used as follows:

"Number of employees limitation" meaning the provisions in the definitions limiting the number of employees in the establishment of the employer (App. 75-78).

"Immediate locality"—the phrase used by the Administrator in his first definition, the amendment, and the alternative portion of his second definition of area of production (App. 75, 77).

"General vicinity"—the expression so used by the Administrator in his second definition and as now used in the current definition (App. 76,77).

"Population criterion"—the provision in the amendment and in one of the alternatives of the second definition that the establishment must be located in a city or town of 2,500 or less population (App. 75-77).

"Haul limitation"—the provision in the amendment and in one alternative in the second definition that the commodity must be obtained from a distance of not more than ten miles from the establishment (App. 76-77).

"First definition"—The Administrator's definition effecting the operations from November 14, 1938, to April 19, 1939 (App. 75).

"The amendment"—the amendment which effected the operations from April 20, 1939, to May 26, 1939 (App. 75-76).

"Second definition"—the definition of the Administrator (of October 20, 1938) effecting the entire second

season and which contained two alternatives; that is, either "general vicinity" or the population criterion and the haul limitation (App. 75-77).

"Total exempt weeks"—the exemption under Section 7(c) permitting overtime for a period not to exceed 14 weeks without payment of overtime wages (App. 82).

"Partial exempt weeks"—provision under Section 7(b)(3) permitting overtime not to exceed 12 hours per day or 56 hours per week in a period or periods not to exceed 14 workweeks without payment of overtime wages (App. 81-82).

"The Act"—Fair Labor Standards Act of 1938 (29 U. S. C. A. 200 *et seq.*).

1. Exception Under Section 13(a)(10).

(a) Facts As to "Area of Production."

The prime question for determination in this case is whether the operations of the Petitioners during the two seasons involved were within the exception provided for under Section 13(a)(10). In other words, whether these operations were within the applicable definitions of area of production and, therefore, not covered by the Act.

Petitioners rely to a large extent upon the findings of the lower court for the facts on this issue. Respondent urges that these findings cannot be solely relied upon because the Circuit Court of Appeals, either explicitly or impliedly, overruled and reversed these findings as far as they pertain to Section 13(a)(10). We shall point out that many of the findings of the lower court were contradictory to the *admitted* facts in the case.

The Respondent, in its Fifth Defense, claims exemption from the Act under Section 13(a)(10) of the Act. All the facts alleged in paragraph 3 of the Fifth Defense as amended, and a portion of paragraph 8 of said defense as amended, were *admitted* by the petitioners to be true and were considered as *facts* in the case to the same extent as if otherwise proven (R. 144).

The *admitted* facts with reference to area of production are:

There are 39 citrus producing counties in Florida, commonly referred to as peninsula Florida. During the period mentioned in the complaint, approximately 48 million boxes of citrus fruit were produced annually in Florida's 39 citrus producing counties for shipment in commerce, being approximately 50% of all the citrus produced in the United States of which total 36.3% was produced in Polk County, Florida, where Respondent's plant is located, this being approximately three times as much citrus as is produced in any other County in Florida, the next largest production being in Orange County, approximately 35 miles from Respondent's plant. The establishment of Respondent is located at or near the exact geographical center of the production of citrus in the largest citrus producing state in the United States, nearly all of said citrus producing counties being contiguous and forming a well recognized area of production, as it has uniformly and customarily been recognized for many years, and as it has been defined by statute and regulation in the administration of many state and Federal laws prior to the adoption of the Fair Labor Standards Act of 1938, all of which have been heretofore undertaken to be administered uniformly throughout said area, where the production, handling, and canning of citrus fruit have simultaneously developed under uniform conditions of competition and gulation as to labor conditions as well as otherwise, and where no logical lines of classification can be drawn bearing a reasonable relationship to the objectives of the Act. The result of this integrated development of citrus is that the range of farm travel is great, many producers owning grove properties more than 100 miles distant, but belonging to a cooperative or customarily dealing with a single independent handler in proximity to one of such grove properties, and producers and handlers alike are competitors and neighbors, meeting in com-

mon markets and under common conditions to bid against one another for a single labor supply or a single price or to exchange solutions of their common problems through their groves or their establishments may be more than 100 miles apart; that there is produced within a radius of ten miles of Respondent's plant, approximately one million boxes of citrus fruit each year, being much more citrus fruit than the total quantity annually obtained by the Respondent for use in its establishment (R. 13, 14, 144).

The facts on this issue other than admitted in this stipulation are:

That the respondent-employer is a cooperative, organized and existing under the laws of the State of Florida (R. 92, 224), a copy of its charter and by-laws being filed as Exhibits A and B (R. 150-174—admitted R. 93).

The Respondent is engaged in packing and canning of fresh citrus fruits and it was stipulated that during the two seasons involved in this litigation, it operated its plant during the following periods:

1938-39 Season.

From November 14, 1938, to December 31, 1938—7 workweeks.

From January 1st, 1939, to May 26, 1939—21 workweeks.

(R. 146-147; through error 21 workweeks shown as 31 workweeks in the record.)

1939-40 Season.

From November 16, 1939, to December 31, 1939—6 workweeks.

From January 1, 1940, to March 30, 1940—30 workweeks.

(R. 147.)

Respondent's establishment is located in the small town of Davenport which has a population of some 650 people and which is located *in the very heart of the citrus producing area of Florida*, the town itself, at one time, having been all a grove, some of which grove has been neglected and abandoned but there are still some 50 to 60 acres of grove within the town limits (R. 125). Fruit is grown commercially all around the establishment of the Respondent (R. 126).

The charter of the respondent limits the stockholders to owners of bearing citrus groves located within the two townships surrounding Respondent's establishment. These groves are blocked out and thus indicated on the map filed as Exhibit D (R. 176—admitted R. 97); the furthest of these groves being about five and one-half miles from Davenport (R. 96). There are numerous other groves, not under the management of Respondent, within the same territory (R. 176) and a large volume of Respondent's products came from these groves (R. 124). By far, most of the fruit handled by Respondent came from the groves owned by its stockholders (First season 81%, second season 70%, Exhibit F, R. 180—admission R. 116). The Fair Labor Standards Act went into effect on October 24, 1938, and the Respondent began its operations on November 14, 1938. During this first season, in excess of 97% of all the fruit in the cannery came from groves located within ten miles of the establishment (R. 180, 226).

On June 19, 1939, the Hon. Alexander Akerman entered a temporary restraining order enjoining and restraining enforcement of Sections 6 and 7 of the Wage and Hour Act as to employees of certain packers and canners of the citrus industry of Florida, in the case of *Lake Wales Citrus Growers Association* v. *Elmer F. Andrews et al.*, in the District Court for the Southern District of Florida. This Respondent, along with practically all packers and canners of citrus fruit in Florida, intervened

in said cause and the said restraining order was extended to cover the employees of the Respondent and, thereafter, a preliminary injunction was issued in said cause on July 11, 1939, which remained in full force and effect until the mandate of the Circuit Court of Appeals was issued on August 10, 1940.

The Respondent operated under the protection of the Federal Court injunction during the season 1939-1940 (Second season involved), and, during that season, obtained 91.3% from groves within a radius of ten miles (R. 180, 227). Exhibit I (R. 185—admitted R. 127) is a Florida map and using Davenport as a center, circles have been drawn on the map with radii of ten, fifteen, twenty, twenty-five and forty miles. This map shows that there is located within ten miles of Davenport a city of over 2,500 population, to-wit: Haines City, and, because of this fact, the lower court held the Respondent's plant was not within the definition of area of production (R. 187-196). Exhibits G and H (R. 181-184, admission 117) show a breakdown for each of the two seasons for fruit that was not obtained from member groves; that is from the member groves located within 5 miles of the plant. These statements are fully explained by the witness in his testimony beginning on R. 119.

(b) Legislative Intent.

Unless the contrary appears, words of a statute are presumed to be used in their ordinary and usual sense and with the meaning commonly attributable to them. *DeGanay* v. *Lederer*, 250 U. S. 376, 63 L. Ed. 1042; *U. S.* v. *First National Bank*, 234 U. S. 245, 58 L. Ed. 1298; *Billings* v. *U. S.*, 232 U. S. 261, 58 L. Ed. 596.

The popular or received import of words furnishes the general rule for the interpretation of public laws. *Woolford Realty* v. *Rose*, 286 U. S. 319, 76 L. Ed. 1128; *U. S.* v. *Goldenberg*, 168 U. S. 95, 42 L. Ed. 594. However; this Court has likewise announced that the words might

not be given their ordinary grammatical construction if the sense be repelled by the intention or if they lead to absurd consequences. *Marks* v. *U. S.*, 161 U. S. 297, 40 L. Ed. 706; *Ozawa* v. *U. S.*, 260 U. S. 178, 67 L. Ed. 199.

While Respondent contends that the words and expressions used in Section 13(a)(10) are clear, unambiguous and give to the Administrator a guide or framework for his regulations or definitions, a mere study of the balance of the Act clearly sustains such contentions.

The preamble, coupled with the provisions of the Act, clearly points to two prime purposes in the minds of Congress. One, to eliminate substandard living conditions brought about by low pay in industry, and, two, not to interfere with the farmers and certainly to put no additional burdens on him. The Act was aimed at "sweat shops" and was passed under the commerce clause.

Between industry and farming lie the operations involved in this litigation. Did Congress ever intend this Act to apply to an industry so closely allied to agriculture that the farmer would have a further burden or expenses in connection with marketing his crop?

Having placed in the Act provisions to cure the evils referred to in the preamble, Congress then proceeded to set forth the exemptions in Section 13. Under paragraph (a) of the Section, Congress provided ten exemptions and a mere reading of each of these exemptions will show that the same were prompted by reason of the fact that the services referred to in each exemption were not strictly industrial. Petitioners contended below that the operations of this Respondent could not be exempt because their employees were not employed in agriculture, or the broader view—that the employer was not a farmer. If Congress had intended that only farmers or persons employed in agriculture were to be exempt, there would have been no reasons whatsoever for the exemptions set forth under Section 13(a). Having exempted the farmers, as well as the employees in agriculture, Congress then

went a step further and said that any individual engaged in certain handling of agricultural or horticultural commodities would be exempt if employed within the area of production (as defined by the Administrator).

Petitioners contend that Congress did not intend the dictionary meaning of the words "area of production." Nowhere in the preamble, or in any other provisions of the Act, do we find any indication whatsoever that the ordinary grammatical construction of this phrase is repelled by the intention of Congress.

Clearly, Congress intended that industry should be covered by the Act, that agriculture should not be covered and that packing and canning of agricultural commodities would not be covered if the operations were performed in the area where the commodity was produced. It left to the Administrator the problem of determining the area of production of the commodities—it did not leave to the Administrator the right to grant or take away the exception.

When the bill S 2475 reached the House from the Senate it was referred to the Committee on Labor and we find that it was not to apply to a "person employed in agriculture." This expression was contained in the definitions in the bill and the Committee (Report 1452) had this to say about it,

> "The term 'person employed in agriculture' as used in the bill, insofar as it refers to fresh fruits or vegetables, includes persons employed within the area of production engaged in preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state."

In the Report of the Committee on Labor, No. 2182, made to the 75th Congress, Third Session, we find,

> " 'Employee employed in agriculture' is defined to include individuals employed within the area of production engaged in storing for the farmer, pre-

paring (but not commercial processing), or packing agricultural, or horticultural commodities in their raw, natural, or dried state. It does not include employees of transportation contractors engaged in transportation of farm products from farm to market. The definitions of 'agriculture' and 'employee employed in agriculture' are important in connection with the exclusion of employees in agriculture from all the provisions of the committee amendment."

Report 2738, being a conference report, includes Section 13(a) substantially as it is found in the Act. This arose by reason of an amendment proposed by Senator Schwellenback which read:

"The term 'person employed in agriculture' as used in this Act, insofar as it shall refer to fresh fruits or vegetables, shall include persons employed within the area of production engaged in preparing, packing or storing such fresh fruits or vegetables in their raw or natural state" (C. R. July 30, 1937, p. 10179)."

Following this proposal, a discussion took place on the Senate floor in which the following was said:

"Mr. Connally: The effect of the amendment is to exempt all employees of apple-packing plants; is it not?

Mr. Schwellenbach: If they are engaged in the area of production and so long as apples are in their natural or raw state; yes, sir.

Mr. Connally: Mr. President, I should like to ask the Senator from Washington a question. Would not the effect of his amendment be to exempt all industrial warehouses and packing plants in apple territories? There is no limit. The condition is that they are packing plants, and if they are, they are exempt.

Mr. Schwellenbach: If a packing plant is working upon fresh fruits or vegetables, in their raw or natural state, within the immediate production area, it would be exempt.

Mr. Connally: My understanding is that the largest apple packing plant in the world is located at Winchester, Virginia, right in the heart of a great apple-producing region. That would be exempt, would it not?

Mr. Schwellenbach: If the work done in that plant is described in the amendment, it would be exempt."

(C. R. July 30, 1937, pp. 10179, 10189, 10181.)

As was said by Judge Deaver in the *Peanut case, supra*, 37 Fed. Supp., Text 634,

> "The intention of Congress is clear and unequivocal to exempt from the Act those employed in performing services described in Section 13(a)(10) upon agricultural or horticultural commodities where the place of employment is within the area in which the commodities are produced."

The principal element in the definitions is the number of employees limitation. Neither the history of the legislation, the preamble nor any subsequent provisions of the Act give any justification for defining area of production according to the number of employees in the establishment.

If Congress specifically refuses an idea or proposition, it then clearly shows the intent of that legislative body with reference to such proposition. The number of employees limitation idea was *twice rejected* by Congress when the same was offered as amendments to this bill. In C. R. July 27, 1937, page 9910, we find that Senator Reynolds suggested an amendment exempting employers of ten or less employees and on July 30, 1937 (C. R. Page 10166), the senator offered an amendment providing an exemption of employers employing ten or fewer than ten persons, but, on the same date, *this amendment was rejected* (C. R. page 10191). The next day, he offered another amendment which exempted from the provisions of the Act employers of five or fewer than five persons and *this amendment was likewise rejected* (C. R. July 31,

1937, page 10266). In other words, this very identical concept was turned down by Congress. How, then, can it be logically contended that Congress intended that the number of employees in a plant should be a controlling basis for determining whether the same was within the area of production?

Subsequent to the rejection of these proposed amendments, the Senate passed the bill on July 31, 1937, with Mr. Schwellenbach's amendment with reference to area of production. The intent of Congress is just as clear from these actions as if it had said in the bill, "the number of employees of an employer shall not be a determining factor as to whether the employer is covered by the Act."

Fleming v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52, involved a contention that the manufacturing of shells into buttons was exempt under Section 13(a)(5) which affords an exemption to employees engaged in certain operations in connection with fish or other aquatic forms of animal and vegetable life.

The Court say (Text 56):

> "We are of the view that the manifest purpose of the exemption was to except from the Act such activities or operations connected with the maritime pursuits described, as were controlled or materially influenced by natural factors or elements."

An amendment was offered to the Act to exempt employees engaged in the manufacturing of fishery products but was rejected and that Court recognized that this action showed the clear intention of Congress by saying (Text 58):

> "The refusal of Congress to thus broaden the Act to include the manufacture of fishery products clearly shows its intention to omit the manufacture of such products."

The action of the legislative body in rejecting the amendment should be weighed with all other circumstances. *Carey* v. *Donohue*, 240 U. S. 430, 36 S. Ct. 386, 60 L. Ed. 726. *Fox* v. *Standard Oil Company*, 294 U. S. 87, 55 S. Ct. 333, 79 L. Ed. 780.

It is also clear from a study of the legislative history, as well as the Act itself, that Congress intended that the area of production should mean a geographical area. As to this, there seems to be no dispute. Therefore, using this test, does the number of employees factor injected into a definition bear any reasonable relation to the geographical area of production of a particular agricultural commodity? For instance, did Congress intend that an employee performing the excepted services on citrus in the very heart of the citrus producing area of Florida be not exempt because he has 10 co-employees, while another employee having only 9 co-employees in an establishment on the outer fringe of the area of production be exempt? The answer is that Congress intended that both employees be exempt so long as their services were performed within the area where the commodity was produced.

As we have shown, Congress intended that the services by a farmer or on a farm as an incident to its farming operations be exempt. This is clearly covered by the agricultural exemptions but the Congress intended that there be a further exemption to apply to persons performing certain specified services on agricultural commodities after these commodities left the farm, but while they were still within the area of production There was no desire or intent to exempt said services if they were performed in an industrial area as distinguished from the production area. In other words, if citrus grown in the agricultural areas of Florida should be carried in its raw state to the eastern industrial areas and there processed, such services in processing the commodity were not to be exempt. This intent was shown when the Congress said the services must be performed within the area of production. By

his definitions, the Administrator has limited the exemption so as to cover practically the same operations as the agricultural exemption. No packer or canner of citrus could ever come under the exemption of Section 13(a)(10) because they all use in excess of ten employees, although they, like the Respondent in this case, have their plants in the very heart of the citrus producing area—are within the actual area of production. Petitioners nowhere question the fact that Respondent's plant is so located. In other words, Petitioners admit, and of necessity must admit, that Respondent's plant is in the very heart of the citrus producing area, therefore, the area of production, but they say that the Respondent cannot claim the exemption because the Administrator has said that the Respondent employs too much help.

(c) Authority and Power of Administrator.

Determining the meaning of area of production involves the scope of the power of the Administrator as well as the validity of his attempted execution of that power.

It is elementary that the legislative power cannot be delegated but the power to determine facts and thereby fix the operation of the legislative act, otherwise complete in itself, may be delegated to an administrative officer. Undoubtedly, the power conferred by this Act is not one to make rules and regulations so as to fix or delimit an area of production, but is a power to determine the geographical location of the area as it actually exists. This necessarily implies that the area of production shall be ascertained and its boundary so defined with sufficient accuracy to permit a decision on the question.

In *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 85 L. Ed. 624, this Court say:

> "The mandate of the Constitution that all legislative powers granted 'shall be vested' in Congress has never been thought to preclude Congress from re-

sorting to the aid of administrative officers or boards as fact-finding agencies whose findings, made in conformity to previously adopted legislative standards or definitions of congressional policy, have been made prerequisite to the operation of its statutory command."

The congressional policy announced by the Act was to exclude from the operation *all* employees engaged in prescribed operations on agricultural products "within the area of production." The power of the Administrator was to examine all pertinent facts and ascertain the limits of the several areas of production of each commodity covered by the exception. Congress did not delegate to him the power to determine policies or to enlarge or restrict the operative force of the language employed by Congress, or to promulgate rules, the application of which will create artificial areas, or which will otherwise limit them without regard to the facts which should properly control the finding in each case.

The Congress recognized that the actual area of production of a commodity already exists and neither the Congress and, certainly, not the Administrator, can change this actual area. The Administrator was not instructed to create an artificial area of production but to find and determine the existing area of production of a commodity. According to some of his definitions, no area of production exists if the establishment employs more than 7 workmen; no area of production exists for a commodity other than in a prescribed circle with a diameter of 20 miles, no area of production exists for a commodity within ten miles of a town of 2,500 or more population, if the employer has his packing or processing plant within that town. Probably, Congress might have created an artificial area of production for the purposes of the Act but nowhere is there any indication that it was the intention of the Congress so to do. It is far beyond the scope of the Administrator's power to attempt to do so. The Act does

not say that the exemption is to apply to the enumerated services within the area of production (as designated by the Administrator). The act says, "as determined by the Administrator." Determine means to find or ascertain. It does not mean to create, delimit, restrict, or designate as he has attempted to do.

The words "area of production" must be construed as laying down a guide or standard to govern the reasonable exercise of discretion by the Administrator, or the statute itself will violate constitutional limitations upon the delegation of legislative power. 11 Am. Jur. 947. It must be construed so as to prohibit the Administrator from arbitrarily extending or limiting the expressed will of Congress, and it follows that, if Congress cannot delegate this power, its assumption by the Administrator must be construed as illegal and void.

"To define" when spoken of space, means to set or establish its boundaries authoritatively. *Robert J. Boyd Paving & Contracting Co. v. Ward*, 85 Fed. 27.

"Define. (3) To determine with precision or clearly exhibit the boundaries of; to mark the limits of; as to *define* the extent of a kingdom or country." Webster's New International Dictionary.

It seems quite clear, then, that the power of, and the direction to, the Administrator is to examine the territory where the products are grown or produced, and to find out the boundaries of the area of such production. If he finds that the labor in question is performed within that area, the exception made by Congress applies.

The Circuit Court of Appeals in the *Peanut case, supra*, say:

> "The word area means a surface, a territory, a region; in this case the territory or region where farm and orchard products are raised."

As Judge Waller, in his concurring opinion in this case (R. 229) says:

> "The real question is whether the actual area of production is to be disregarded and the definition of the Administrator is to control rather than the intent of Congress not to handicap the farmer in the marketing of his produce * * * to put it differently, can the Administrator be said to have defined the area of production of certain commodities when in truth and in fact he has *not* defined such area of production?"

This case certainly presents this clear cut issue. The parties litigant, the attorneys and the courts all know that this Respondent's establishment is located in the area of production of citrus fruit. It is an established fact. Does the Administrator have any power to say this fact, known to all, is not a fact? No person could stand at Respondent's plant surrounded by groves bearing citrus fruit and say that he does not stand in the area of production of citrus fruit. However, following the Administrator's concept, the minute 10 other people walk up beside the person standing at the plant, he is no longer in the area of production. Does the fact that ten other people came to the same place change the location of the plant? To ask the question is, of course, to answer it.

To follow the District Court's reasoning, a man standing in the midst of the groves could not be in the area of production if there happened to be a town of 2,500 or more population anywhere within ten miles of him.

Judge Deaver in the *Farmers Peanut case, supra* (37 Fed. Supp., Text 632), had this to say:

> "No authority is delegated to the Administrator to make any definition, or to prescribe any limitation upon the operation of the exemption afforded by Section 13(a)(10) of the Act, except to define 'area of production.' "

Lukens Steel Company v. *Perkins*, 107 F. 2d 627, is a recent case familiar to this Court because the order of the United States Circuit Court of Appeals for the District of Columbia, in that case, was up for review before this

Court; the decision being reported in 310 U. S. 116, 84 L. Ed. 1108. This Court held that plaintiffs in the case below did not have such standing as to entitle them to the injunction but had nothing whatever to say about the rulings of the Court of Appeals on the merits. The Court will recall that this case involved the action of the Secretary of Labor under the Public Contracts Act. This Act in substance provides that the government could not enter into a contract for materials or supplies in an amount exceeding $10,000 unless the contractor had paid not less than the minimum wages determined by the Secretary of Labor to be the prevailing minimum wages for similar work in the *locality* in which the materials were manufactured. She determined that the locality for furnishing products of iron and steel included 13 states, a portion of a 14th, and the District of Columbia. The determination was attacked and the Court of Appeals delivered a very exhaustive opinion and reached the conclusion that the action of the Secretary of Labor was beyond her power and void. The opinion expresses many fundamental principles of law, citing ample authority therefor and then, after applying these principles to the questions at hand, says:

> "To permit the Secretary to establish a minimum wage scale for the area embraced within fourteen states and the District of Columbia would be to defeat rather than to accomplish the purpose of the Act" (Text 634).

This same thought is just as applicable to the case at bar. May we paraphrase it thus, "to permit the Administrator to delimit the area of production of a commodity in conflict with its actual area would be to defeat rather than to accomplish the purpose of the Act."

This Court has also said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute.

American School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94, 47 L. Ed. 90, involved the action of the Postmaster General in refusing to deliver certain mail. After pointing out that the facts did not authorize the action of the Postmaster General, and that the Courts must have power to grant relief, the Court stated:

> "Otherwise, the individual is left to the absolutely controlled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized, he thereby violates the property rights of the persons whose letters are withheld."

Under the Railway Land Grant Act of July 27, 1866, the Secretary of Interior insisted upon a demand that a railroad grantee make an advance deposit to cover estimated cost of surveying. In *Santa Fe Pacific Railroad Company* v. *Frank K. Lane*, 244 U. S. 492, 61 L. Ed. 1275, this Court held that the Secretary of Interior in making such a demand had plainly exceeded his authority.

A large number of the District Courts, as well as the Circuit Court of Appeals of the Fifth Circuit, took occasion in their opinions to point out that the Administrator had far exceeded his authority in promulgating the involved definitions.

The power and authority of the Administrator was limited to an ascertainment of the actual area where the commodity is produced and when he attempted to change this area, he went far beyond his authority and not only formulated a definition which is unconstitutional and, therefore, void, but also in conflict with the expressed words of the Act itself, in conflict with the intention of the Congress and beyond the scope of his authority.

(d) Definitions of the Administrator Involved in This Litigation.

During the two seasons involved in this case, there were two definitions and an amendment and the follow-

ing table shows the definitions and the amendment involved, the operating times and the facts with reference to obtaining the raw products during those periods of time. The portions of the definitions held to be void by the Circuit Court of Appeals are in bold type.

Definition	Time Involved	Haul Less Than 10 mi.	25 mi.	Unknown
	SEASON 1938-1939			
	First Definition			
individual shall be re- ed as employed in the a of production" within meaning of Section 13 0) in • • • canning of cultural or horticul- commodities for ket • • • if the agri- ural or horticultural modities are obtained he establishment where s employed from farms the immediate locality **the number of em-** **ees in such establish-** **t does not exceed seven** p. 75).	Nov. 14, 1938 to Apr. 19, 1939	97.24%	1.80%	96/100%
	Amendment			
with respect to perish- or seasonal fresh fruits vegetables, if he is en- d in canning such prod- for market in an es- ishment which is located he open country or in a l community and which ins all of its products n farms in its immediate lity. As used in this section (e) "open coun- or "rural community" l not include any city own of 2500 or greater ulation according to the United States Census , and "immediate lo- y" shall not include any ance of more than ten s (App. 75-76).	Apr. 20, 1939 to May 26, 1939	97.24%	1.80%	96/100%

SEASON 1939-1940

Second Definition

An individual shall be regarded as employed in the "area of production" within the meaning of Section 13 (a)(10) in * * * canning of agricultural or horticultural commodities for market * * * (a) if he performs these operations on materials all of which come from farms in the general vicinity of the establishment where he is employed **and the number of employees engaged in those operations in that establishment does not exceed seven** or (d) if he performs those operations on materials all of which come from farms in the immediate locality of the establishment where he is employed and the establishment is located in the open country or in a rural community. As used in this subsection (d) "immediate locality" shall not include any distance of more than ten miles and "open country" or "rural community" shall not include any city or town of twenty-five hundred or greater population according to the 15th United States Census, 1930. (App. 76-77).	Nov. 16, 1939		
	to	91.39%	4.%
	March 30, 1940		

It will be noted that the number of employees limitation applies to the first definition and to one of the alternatives in the second definition as well as to a current definition (App. 75-78).

The number of employees of the Respondent exceeded the limitation, and, likewise, exceeds the limitation in the present definition and, therefore, should this Honorable Court hold this element of the definitions valid, it would necessarily mean that from November 14, 1938, to April 19, 1939, during the period of the first definition, this Respondent was not within the area of production as defined by the Administrator and, therefore, not entitled to the exemption during that period of time.

Such a holding would mean that, during the entire second season, this Respondent was likewise outside the area of production unless it was within the alternative definition during the second season.

A specific ruling on the population criterion is unnecessary because this Respondent's establishment was located within a town of some 650 population.

The ten mile haul limitation was in the amendment and involves a period of some 30 or 40 days of the first season. In determining this point, the Court will, undoubtedly, consider whether *all* of the fruit must be obtained within the ten mile limit or *substantially all;* the trial judge said *all* and the Circuit Court of Appeals said *substantially all.*

For approximately five months in the beginning of the first season, the first definition applied containing "immediate locality" and number of employees limitation. "Immediate locality" might have a different meaning when applied to different sets of facts.

In the amendment of April 20, 1939 (App. 75), the Administrator said that "immediate locality" meant obtaining the commodities within a radius of ten miles. However, under the decision of *Manhattan General Equipment Company* v. *Commissioner of Internal Revenue,* 297 U. S. 129, 80 L. Ed. 528, the amendment was not retroactive and, therfore, "immediate locality" the first definition did not necessarily mean within a radius of ten miles.

During the second season, there were in force and effect alternative definitions, one being "general vicinity" with the number of employees limitation and the other being a requirement that the establishment be located in a town of 2,500 or less and obtain its commodities within a distance of ten miles. The first of these alternatives is a definition similar to the one now in force and effect except that the employee number limitation has been changed from 7 to 10 (App. 77). Therefore, a ruling by

this Court upon that alternative would settle the validity or invalidity of the current definition.

The elements of the definitions involved in the case are:

1. The expression "immediate locality";
2. The expression "general vicinity";
3. The haul limitation; and
4. The number of employees limitation.

The actual area of production of an agricultural commodity might conceivably change over a period of years due to natural causes but, assuredly, the actual area of production since October, 1938, has not undergone the numerous and radical changes indicated by the several definitions of area of production during that period of time. The fact that the Administrator has seen fit to make these different definitions or amendments is positive evidence of the recognition on his part that the former definitions were invalid. If this not be true, why did he change them? If the definition providing that the commodities must be obtained from the "immediate locality" and that the number of employees be limited to seven was a valid defining of area of production on October 20, 1938, why was it changed? If the population criterion and the haul limitation were necessary and proper elements in defining the area of production in 1939 why are they not proper elements now, although these factors were abandoned in later definitions and do not appear in the current definition?

It has been consistently argued that it was impractical to formulate definitions applicable to one commodity or a group of commodities yet as early as June, 1939, the Administrator promulgated a separate definition for dry edible beans and another definition for Puerto Rican leaf tobacco (App. 78-79). If those two commodities could be withdrawn from the general definitions why could he not withdraw other commodities to which his general definition was unreasonable and capricious?

(e) Principles Applicable to Determination of Validity of Definitions.

A case to which we particularly call the Court's attention is *Carter* v. *Carter Coal Company*, 298 U. S. 238, 80 L. Ed. 1160, involving the Bituminous Coal Conservation Act. One point considered by the Court was whether the exaction of fifteen percentum on the sale price of coal in the mine is a tax or penalty and held that the same was a penalty, although carried in the Act as a tax. Mr. Justice Sutherland, speaking for the Court, said:

> "While the law maker is entirely free to ignore the ordinary meanings of words and make decisions of his own (citing cases) that device may not be employed so as to change the nature of the acts or things to which the words are applied."

Certainly, if Congress could not do that, an administrative agency could not. The Administrator cannot by any definition change the actual area of production.

Judge Waller, in his concurring opinion (R. 230) uses this example:

> "Congress can see a rabbit run across a state line and declare it was a lion, and a lion it is, but can the Administrator do that? My thought is that the Administrator must define 'area of production' in fact and without regard to the number of employees, without regard to the location of a city, and without regard to any factor, other than the area within which such fruits and vegetables are customarily and in the usual course of business, brought by the farmer to be marketed or processed."

The *Carter Coal Company case, supra*, likewise dealt with a problem that often times arises when a portion of a statute is found to be invalid and reached the conclusion that Congress by the Act intended to regulate labor and prices and if one portion of the Act was stricken, the other would likewise follow as being an essential part thereof.

In our case, we have three different definitions involved with the number of employees limitation common to the first definition (immediate locality) and to one of the alternatives in the second definition (general vicinity). The population criterion and the haul limitation is common to the amendment and to one of the alternatives in the second definition. Therefore, this Court will consider the validity or invalidity of the several elements and if any of said elements are found to be proper, decision must be reached as to whether the entire definitions will be held void or whether approved with the invalid element or elements deleted.

It is contended by Respondent that if the number of employees limitation is held to be invalid, the balance of the definitions in which such limitation appears would not thereby be void. However, we do respectfully submit that the limitations "immediate locality" and "general vicinity" are likewise invalid and, therefore, the entire definition is void.

With respect to the amendment, which is the same as one of the alternatives in the second definition, it would seem that the elements there are so interlocked that a deleting of one of the elements would necessarily invalidate the entire definition. In these definitions, the Administrator said that the establishment must be located in a town of 2,500 or less population and procure his commodities from not more than ten miles.

Another principle announced in the *Carter Coal case, supra*, is:

> "Whether the end sought to be attained by an Act of Congress is legitimate is wholly a matter of constitutional power and not at all of legislative discretion. Legislative congressional discretion begins with the choice of means and ends with the adoption of methods and details to carry the delegated powers into effect * * * For while the powers are rigidly limited to the enumerations of the Constitution, the means which may be employed to carry the powers

> into effect are not restricted save that they must be appropriate, plainly adapted to the end, and not prohibited by, but consistent with, the letter and spirit of the Constitution." Text 291.

The same principle applies to a means adopted by an Administrative agency. Such means must be "consistent with the letter and spirit of the Constitution."

Due to the necessities that have arisen by many of the Acts of Congress, administrative bodies have become very essential instrumentalities in the carrying out of the intents and purposes of Congress. Many of the rules and regulations of such agencies or commissions have reached this Court for interpretation and, in connection with the consideration thereof, certain fundamental principles have been announced, with which this Court is thoroughly familiar. In substance, the Respondent understands that such regulations will be upheld by this Court if the same are within the scope of authority of the commission, if the requirements of due process are met and if the action is based upon substantial evidence and complies with the spirit and letter of the Constitution and is not arbitrary or unreasonable. *St. Joseph Stock Yard Company* v. *United States*, 298 U. S. 38, 80 L. Ed. 1033; *Manhattan General Equipment Co.* v. *Commissioners of Internal Revenue*, 297 U. S. 129, 80 L. Ed. 528, where it is stated:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." Citing numerous other cases (Text 134).

Miller v. *United States*, 294 U. S. 435, 79 L. Ed. 977; *Shields* v. *Utah-Idaho, Central R. R. Co.*, 305 U. S. 177,

83 L. Ed. 111; *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 87 L. Ed. Advance Sheets 540; *Lynch* v. *Tilden Produce Co.*, 265 U. S. 315, 68 L. Ed. 1034; *Gray* v. *Powell*, 314 U. S. 402, 86 L. Ed. 301.

The Circuit Courts of Appeals have also followed these principles. As an example see *Knight* v. *Mantel*, 135 F. 2d 514; *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52; *U. S.* v. *Stanolind Crude Oil*, 113 F. 2d 194; *Utah Copper* v. *Railroad Retirement Board*, 129 F. 2d 358.

This Court has on several occasions considered findings and orders of the Interstate Commerce Commission and, although the above principles are generally applicable, this Court consistently relies on Section 16 of the Interstate Commerce Commission Act providing that the findings and order shall be *prima facie* evidence. Petitioners in their brief rely, to a large extent, on these Interstate Commerce Commission cases. Respondent does not urge any variation of these principles but contends that an application of them to the regulations of the Wage and Hour Administrator lead unerringly to the conclusion that these definitions are void for they violate the provisions of the Constitution, are beyond the scope of and in direct conflict with the Act itself, are contrary to the legislative intent and are capricious and unreasonable.

(e)(1) The Definitions Are in Conflict with Article V of the Amendments to the Constitution of the United States.

The first and second definitions are so vague, uncertain and indefinite as to deprive this Respondent of liberty or property without due process of law in violation of Article V of the Amendments to the Constitution. This is true because of the indefinite and ambiguous phrases "immediate locality" and "general vicinity."

It is not contended that this unconstitutionality applies to the amendment in force and effect from April 20, 1939, to June 17, 1939, covering about 5 weeks of the operating

time in the first season, because during that period, "immediate locality" was definitely defined as meaning a distance of ten miles or less and the amendment is being attacked on other grounds.

The Fair Labor Standards Act provides two heavy penalties under Section 16: *i. e.*, a fine of not more than $10,000 or imprisonment and payment of liquidated damages equal to any unpaid wages and unpaid overtime, together with court costs and attorneys' fees.

Congress realized that to leave the exceptions under Section 13(a)(10) as applying to employees within the "area of production" without some defining of said indefinite expression, would, undoubtedly, cause the statute to be unconstitutional and, therefore, instructed the Administrator to define "area of production," giving to him standards and framework sufficient for him to fill in the details.

Let us consider the plight of an employer engaged in the canning business in the heart of the citrus belt of Florida, such as Respondent. The Act went into effect on October 24, 1938, and the first action of the employer was to consider whether or not he was subject to the Act; whether he would be subject to the heavy penalties if he failed to comply. The Administrator had promulgated a definition of area of production which, in effect, said that the employer would have to obtain its commodities from farms in the immediate locality (App. 75). This definition remained in force and effect until April 20, 1939, which covered the first season involved in this case with the exception of the last few weeks. If he procured his commodities from the "immediate locality" he was not subject to the wages and hours provisions of the Act and the other provisions, such as Child Labor and record keeping, were of no particular concern—he was not violating the Child Labor provision and his records were already being kept in compliance with the requirements of the Act. To comply would mean additional expenses which would have

to be borne by the farmer; and, yet, it appeared very clearly that the Congress did not intend that. There was no assurance that his competitor would make the same guess as to what to do. If he was not obtaining his commodities from the "immediate locality," he must immediately comply with Sections 6 and 7 of the Act or be subject to the penalties provided in the Act. What would be the guide to a court or jury in ascertaining what constituted "immediate locality"? What might be regarded as "immediate locality" to one employer might not be so regarded to another. The dividing line between what was lawful and unlawful had been left to conjecture. As this court so aptly said in *Connally* v. *General Construction Co.*, 269 U. S. 385, 70 L. Ed. 322:

> "Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? Two men moving in any direction from the place of operations, would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality."

An ordinary person could not intelligently choose in advance what course it was lawful for him to pursue, which is one of the tests laid down in the *Connally case, supra.*

From April 20, 1939, to May 26, 1939, the employer then had a definite statement of what the Administrator meant by "immediate locality"—ten miles if the plant was in a town of less than 2,500.

During the second season involved in this case, the employers found themselves still confused because of the use of the indefinite phrase "general vicinity." During the second season, there were alternative definitions, one of which was "general vicinity" with absolutely no means of ascertaining what the Administrator meant and the other was "immediate locality" defined by the Administrator to mean not more than ten miles.

Was it necessary that he obtain every grapefruit and every orange from a distance of ten miles or from the "general vicinity," whatever that meant, or if he obtained substantially all of his commodities from ten miles or less or from "general vicinity," was he insuring himself that he would not be subject to fine and imprisonment or to the payment of large liquidated damages? Was he subjecting himself to harsh penalties if he procured a small portion of his fruit beyond ten miles?

There are innumerable decisions of this court and others to the effect that a penal statute will be held invalid if it is so vague and indefinite that it does not lay down a yardstick by which a reasonable person knows whether he is violating the Act or complying with it.

One of the leading cases on this point is *Connally v. General Construction Co., supra,* which involved a state statute requiring the contractor under penalty to pay his employees "not less than the current rate of per diem wages in the locality where the work is performed." This Court reached the conclusion that the statute was invalid because of vagueness and indefiniteness in two particulars—with reference to current rate of per diem wages and in using the expression "locality." The Court say:

> "* * * that it cannot be determined with any degree of certainty what sum constitutes a current wage in any locality; and the term 'locality,' itself, is fatally vague and uncertain * * * that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a Statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

That particular state statute had been construed by the highest court of that state, to-wit: Oklahoma in *State* v. *Tibbetts*, 205 Pac. 776, but this court with reference to that decision said:

> "But all that Court did there was to define the word 'locality' as meaning 'place,' 'near the place,' 'vicinity, or neighborhood.' Accepting this as correct, as of course we do, the result is not to remove the obscurity, but rather to offer a choice of uncertainties."

In *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 70 L. Ed. 1059, this court for the same reasons struck down the Chinese Bookkeeping Act which required Chinese merchants, doing business in the Philippine Islands, to keep their accounts in the English or Spanish language or local dialect because the same deprived them of their liberty and property without due process of law.

The cases of *International Harvester Company of America* v. *Commonwealth of Kentucky*, 234 U. S. 216, 58 L. Ed. 1284, and *Collins* v. *Commonwealth of Kentucky*, 234 U. S. 634, 58 L. Ed. 1510, involved Kentucky statutes which the Court held invalid because they were vague and indefinite.

The Lever Act was involved in *United States* v. *Cohen Grocery*, 255 U. S. 81, 65 L. Ed. 516, and the particular portion of the statute under attack was:

> "That it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."

That these words did not fix an ascertainable standard of guilt clearly resulted from their mere statement, according to Mr. Chief Justice White, who wrote the opinion for the Court, holding the section repugnant to the Constitution and citing numerous authorities.

One of the state court decisions on this point is *State* v. *Lantz*, 111 S. E. 766 (W. Va.), where this language is found:

> "If this statute should be upheld, there would be no uniform rule of conduct governing the operation of an automobile upon curves in public roads. There would be as many different standards as there would be different opinions among the juries and judges trying the cases, as the same arise, and no man would ever know, until after he was tried and convicted or acquitted upon the charge brought against him whether he had been guilty of an offense or not."

This quotation is so applicable to the situation at bar and is borne out by the fact that there have been some 18 cases involving this particular portion of the Act, to-wit: Section 13(a)(10). No part of the Act has been so troublesome or has given rise to so much litigation as this section due to the numerous unsuccessful attempts of the Administrator to delimit the exemption and his failure to define it within the standards laid down by Congress.

The above cited cases, of course, involve statutes rather than regulations but, since a regulation has the force and effect of law, unless and until set aside by a court, the same general principles would apply; otherwise, we would have the situation where an administrative body could violate the Constitution of the United States while the legislative branch of the government would be limited by its provisions.

To say that this suit does not involve the penal provisions of the Act is merely to evade the question. The Respondent is confronted with a claim for not paying overtime wages, for an amount equal to the same in liquidated damages, for costs, and attorneys' fees. True, this Court has held that the payment of liquidated damages is not a penalty but, certainly, it is not thought that this Respondent is in the position of violating an Act as far as the employees are concerned and not subjecting itself to the heavy penalties.

An adjudication by this Court that the limitation of the number of employees provisions in the definitions are void and that the defining of the area of production by "general vicinity" is sufficient would still leave the packer and canner of agricultural commodities in the United States in a quandary as to whether he procures his commodities from the "general vicinity" of his plant and until courts or juries have passed upon each individual case no employer can know whether his actions are subjecting him to the heavy penalties of the statute.

(f) Court Decisions on Issues Involved in This Litigation.

Petitioners on pages 31 and 32 of their brief cite 21 cases decided by the lower courts (exclusive of the opinions in this case) which they allege deal with the Administrator's definitions. Petitioners omit the decision in *Janes* v. *Lake Wales Citrus Growers Association* by the District Court, which was entitled *Lakes Wales Citrus Growers Association* v. *Andrews*, and also omit from their list *Walling* v. *Yeakley*, District Court of Colorado, which when added to the list, will make a total of 23 cases. For convenience, we shall group these decisions as follows:

1. CASES WHERE THE DECISION WAS REACHED ON POINTS OTHER THAN THOSE INVOLVED IN THIS LITIGATION.

Redlands Foothills Groves v. *Jacobs*, 30 Fed. Supp. 995; Yankwich, Judge:

This was a case seeking a declaratory judgment as to whether the operations of certain employers were subject to the Act and for an injunction restraining the enforcement of the Act. The Court held that it did not have the necessary parties before it and, therefore, dismissed the bill. He made several comments about the definition of area of production indicating that if the validity of the same was properly before him he would hold the same valid.

Janes v. *Lake Wales*, 110 F. 2d 653 (C. C. A. Fifth), Sibley, Judge, and opinion by the District Court, same case:

The Court here merely held the lower court was without jurisdiction to enter the injunction because of lack of necessary parties.

Abram v. *San Joaquin Cotton Oil Company*, (S. D. Cal.) 46 Fed. Supp. 969, O'Conner, Judge:

The definition of area of production was not involved in this cause because the Court held the services of the employees did not fall within the described operations in Section 13(a)(10) and, therefore, ruled that they were not within the exception and had no occasion to nor did it consider any definitions of area of production.

Gaskin v. *Clell Coleman & Sons*, Mercer County, Kentucky:

Clearly this case has no place in any consideration by this Court of the issues in the case at bar. In a suit by employees, the employer contended it was exempt under Section 13(a)(10) but the Court held the exemption applied to commodities handled for market and not for milling purposes and, therefore, the operations did not fall within Section 13(a)(10).

Abram v. *San Joaquin Cotton Oil Company*, (S. D. Cal.) 46 Fed. Supp. 969:

This case did not in anywise involve the validity of any definitions. However, the Court did hold that the plaintiffs' services were rendered in the area of production.

Walling v. *The Peacock Co.*, Western District of Wisconsin:

Although the Court held that since the employer made customary purchases of the commodity from another state,

it could not be within the area of production, the case went off on the point that the services did not fall within those designated in the exemption.

The six above listed cases should be withdrawn from the list, leaving a total of seventeen, which we further classify:

2. CASES HOLDING THE LIMITATION AS TO NUMBER OF EMPLOYEES VOID.

Lake Wales Citrus Growers Association v. *Andrews et al.*, District Court, Florida:

As employers did in the *Redlands case, supra,* the packers and canners of citrus fruit in Florida, attempted to get an early adjudication of its rights and responsibilities under the Fair Labor Standards Act and instituted suit in the District Court for the Southern District of Florida entitled *Lake Wales Citrus Growers Association* v. *Elmer F. Andrews* which became, on appeal, *Janes* v. *Lake Wales, supra.* In that case, declaratory judgment was sought together with an order restraining the enforcement of the Act. The trial judge made extensive findings which were not ruled upon by the Circuit Court of Appeals because that Court held the Court without jurisdiction because of lack of necessary parties. Among other facts, the District Court found,

> "that citrus fruits are produced in commercial quantities in thirty-nine counties of the State of Florida, as stated in the amended complaint, said counties comprising a contiguous area which is co-extensive with the Peninsula area of Florida";

also found that the employers, including this Respondent, had its establishment within the 39 counties and said that,

> "each of said plaintiffs and of said intervenors has its packing or canning establishment or establishments located in an actual area of commercial production of

Florida fresh citrus fruit; that is, in an immediate locality where citrus fruits are grown and produced in commercial quantities."

The Court concluded, as a matter of law, that the definition of area of production was arbitrary, capricious, unreasonable, and discriminatory in violation of the Act and of the legislative intent and, therefore, void; that the Act does not authorize the Administrator in defining the term "area of production" to change the usual, logical, reasonable and generally accepted meaning of the words "area of production," that there is no legal basis for a distinction between two establishments, both of which are located within the actual area of production, when one of said plants obtains its products from an area within ten miles while the other goes beyond ten miles for a portion of its products, that the Administrator cannot legally provide by regulation that an individual employed in an establishment in the *actual* area of production is not so employed simply because some part of the products handled by the establishment are obtained from farms more distant than ten miles, that the definition is void and unenforceable because it makes arbitrary, unfair and discriminatory distinctions between establishments so as to allow to some the exception given to them by Congress under Section 13(a)(10) and to take away these exceptions from others.

In that case, in which Respondent was a party, we have specific findings by the Court as to the citrus industry, the same industry involved in this case.

Fleming v. *Farmers Peanut*, 37 Fed. Supp. 628:

The Court held any limitation upon the number of employees is invalid and should be regarded as surplusage.

Caliup v. *Terrell Cotton Warehouse Co.*, District Court of Texas:

There the Court held the Administrator acted out of his sphere in making the area of production depend upon the number of employees, saying:

> "That is an attempt to ingraft upon his authority something that the Congress did not give him authority to do. It did not give him the right to say that the number of persons who were engaged in storing, shall determine whether this exemption is operative or not."

The Judge further stated that he thought the bill was aimed at those who were at distant points and who were engaged in profit-making as middle men.

Clark v. *Jacksonville Compress Company*, 45 Fed. Supp. 43, Eastern District of Texas:

In the conclusions of law, the District Judge said that the limitation as to the number of employees in an establishment or engaged in operations named in the exemption is void.

Fleming v. *Farmers Peanut*, Fifth Circuit, 128 F. 2d 404:

This case and the case at bar are the only decisions of a Circuit Court of Appeals on this point and the Court in both cases held very definitely that the limitation of the number of employees in the establishment had nothing whatsoever to do with defining "area of production" and, therefore, held such limitation void.

Byus v. *Traders Compress Company*, Western District of Oklahoma:

There the Court held the definition in its entirety invalid.

Walling v. *McCracken County Peach Growers Association*, Western District of Kentucky:

The Court said that the Administrator exercised his authority unreasonably in restricting the exemption to

those employees where the number of employees did not exceed ten and, therefore, the limitation of the number of employees void, saying,

> " 'Area of production' deals primarily with geographical territory and necessarily includes all employers within the geographical limits so set up."

Shain v. *Armour & Company*, Western District of Kentucky:

Following the *McCracken County Peach Growers Association case, supra*, the Court held the limitation of the number of employees to be invalid.

Rafael Bruno v. *The Hills Bros.*, District Court of Puerto Rico:

The Court said,

> "to define 'area' in terms of number of employees seems to me a clear extra-limitation of his power by the Administrator. Area of production has nothing to do with the number of workmen."

Holt et al. v. *Barnesville Elevator Company*, District Court of Minnesota:

This Court specifically held the limitation as to the number of employees invalid.

Therefore, ten courts have specifically held the limitation void.

3. Cases Holding the Limitation As to the Number of Employees Valid.

Gordon v. *Paducah Ice Manufacturing Company*, 41 Fed. Supp. 980:

The Court stated that the record threw no light upon the history or origin of the Administrator's definition, nor did it disclose what facts were considered by the Administrator. He, therefore, presumed the Administrator had exercised his legal authority in a reasonable and proper

manner and that he was not prepared to hold the limitation void.

Silgaro v. *Port Compress Company*, 45 Fed. Supp. 88—Southern District of Texas:

Although the ruling of the Court is by no means clear, we place the case in this category because the court stated that he was unwilling to say that the limitation of the number of employees was invalid; yet, he finally held the employees were within the area of production, although the defendant had more than ten employees. The decision is somewhat confusing.

Therefore, we have two district courts that have said they are unwilling to hold the limitation void, and the total score now stands 10 to 2 in favor of holding the limitation void.

4. Decisions Holding Void the Restriction As to Location of the Plant in a Town of Less Than 2,500.

Lake Wales v. *Andrews*, District Court of Florida:

The District Court specifically held that

"the population of a city or town in which the plaintiff's establishments are located cannot and does not have any reasonable relation to the question of whether or not such establishments are located within the area of production of Florida citrus fruit."

This finding was undisturbed by the appellate court.

Fleming v. *Farmers Peanut*, 37 Fed. Supp. 628:

The Court said that no legal basis could be suggested for the requirement that the establishment within the area of production be located within or without the corporate limits of a town of 2,500 or more population and held this limitation void.

Clark v. *Jacksonville Compress Company*, 45 Fed. Supp. 43:

The Court said that any requirement that the place of employment be located within or without a city having a certain population had no reasonable relation to a valid definition of area of production.

Jesse Carpenter v. *Waxahachie Cotton Warehouse,* Texas Court of Appeals:

This case involved a cotton warehouse located in a town of approximately 9,000 population. A portion of the time involved was covered by the regulation containing the population criterion and the Court disregarded this portion of the definition and held that the services were performed within the area of production of the raw cotton.

Walling v. *McCracken County Peach Growers Ass'n,* Western District of Kentucky:

Although the Court did not specifically rule upon the population criterion, it did hold the employment to be within the area of production after finding that the employer had its establishment in a city of approximately 33,000 population.

Bruno v. *The Hills Bros.,* District Court of Puerto Rico:

The Court specifically held that part of the Administrator's definition restricting the location of the establishment to a town of 2,500 population or less to be invalid.

As this restriction that the plant must be located within a town of 2,500 or less population in order to be in the area of production remained a part of the definition for only a short time, it can readily be understood why this point was not passed upon by any of the other decisions.

5. Decisions Holding Valid the Restriction As to Location of the Plant In a Town of Less Than 2,500.

There are no decisions falling in this classification unless it be *Silgaro* v. *Port Compress, supra,* wherein the Court said he was unwilling to say that the Administrator might not reasonably classify compresses as to location "(*i. e.,* whether in open country, rural community, town or city, etc.)" However, in that case the establishment was located in the city limits of Corpus Christi, a city with a population of approximately 75,000 and the Court held that the employer was within the area of production and entitled to the exception.

Six District Courts have held the population criterion void—one doubtful.

6. Cases Holding the Ten Mile Haul Limitation Void.

Lake Wales Citrus Growers Ass'n v. *Andrews,* District Court of Florida:

The Court held the ten mile haul limitation void.

Fleming v. *Farmers Peanut,* 37 Fed. Supp. 628:

The Court said no legal basis can be suggested for defining "area of production by arbitrarily prescribing a circular area having a radius of ten miles, as applied to peanut crops in the Southeastern peanut producing area."

Clark v. *Jacksonville Compress Company,* 45 Fed. Supp. 43:

The Court held the Administrator had no authority to prescribe a condition, qualification, restriction or limitation, such as the requirement that the commodities come from farms within ten miles.

Jesse Carpenter v. *Waxahachie Cotton Warehouse*:

The first definition was involved for a portion of the time which contains the ten mile haul limitation. The

Court points out that during the period of the employment, approximately 5,600 bales were stored in the warehouse and that all of the cotton was produced in farms in the general vicinity or trade territory with the exception of some 500 which came from beyond the ten mile radius of the town. The Court held the employer was within the area of production.

Byus v. *Traders Compress Company*, Western District of Oklahoma:

The Court held that where the cotton received was from points more than 175 miles distant, it came from the general vicinity of the compress, and held the definition promulgated by the Administrator to be capricious, arbitrary and entirely void.

Holt et al. v. *Barnesville Farmer Elevator Co.*, District Court of Minnesota:

This is a well reasoned opinion involving grain. The Court does not specifically state that the ten-mile haul is invalid but it does hold that where the grain was obtained from within a distance of 20 to 25 miles, it was in the immediate locality, which the Administrator defined to mean ten miles.

7. Cases Holding the Ten Mile Haul Limitation Valid.

None.

Since the ten mile haul limitation constituted the definition of "immediate locality" which was in effect for a period of only some 60 days, although contained in an alternative definition in the second definition, there are only six cases involving this specific point, all holding the limitation void.

8. Cases Construing "General Vicinity."

Although several of the courts have criticised this expression as being most indefinite and ambiguous, none

of the judges have found it necessary to pass directly upon its validity, being content to applying the particular facts of the case to such expression giving it a wide and liberal construction. These cases are:

Fleming v. *Farmers Peanut*, 37 Fed. Supp. 628:

In this case, involving peanuts, it was shown that approximately 70% of the commodity came from farms within a radius of ten miles and, except for a negligible percentage, the rest came from farms within a radius of 25 miles. The Court held that the same came from the "general vicinity" of the establishment.

Fleming v. *Farmers Peanut Company*, 128 F. 2d 404:

The appellate Court said,

> "that part of the definition which speaks of materials all coming from farms in the general vicinity of the establishment, though not very precise, is a legitimate defining of an area of production of agricultural commodities * * * an indefinite definition may well be given a broad application"

and agreed with the lower court in finding that the peanuts came from farms in the general vicinity of the establishment.

L. Metcalfe Walling v. *The Peacock Corporation*, Eastern District of Wisconsin:

The Administrator was seeking an injunction. The employer claimed exemption under Section 13(a)(10). The opinion sets forth the facts showing that the plant is located in Wisconsin handling onion sets which are produred from a rather small concentrated area in Wisconsin, from another area in Illinois, and also some from the State of Colorado, and that some 30 to 40 miles separate the producing areas in Wisconsin and Illinois. The particular definition involved was the one providing for general vicinity and the limitation of ten employees (this lat-

ter element not being involved in the case). The definition by the Administrator was not attacked in that case and the Court held that under the facts, the employee was not within the area of production because of the great distances from which the commodities were obtained.

Clark v. *Jacksonville Compress Company*, 45 Fed. Supp. 43:

The Court found that all of the cotton was received from within 75 miles of the establishment and, therefore, within the general vicinity, finding that only 10% originated within ten miles, and various percentages up to 75 miles.

Gordon v. *Paducah Ice Manufacturing Company*, 41 Fed. Supp. 980:

Strawberries were involved in this case and the Court held that since they were grown on farms in the same county where employer's establishment was located and not adjoining counties, the commodity came from the general vicinity.

Remington v. *Shaw*, Western District of Michigan:

Grain was obtained by the defendant from farmers within an area of from 30 to 35 miles and the Court held this was within the general vicinity.

Silgaro v. *Port Compress Company*, 45 Fed. Supp. 88:

This decision involved the definition using the term "general vicinity" and the Court found that 90% of the cotton came from five designated counties known as "The Coastal Bend Area of Texas." The Court held the employees were within the exemption.

Dean Cox v. *Swift & Company*, Northern District of Texas:

The commodities were obtained from a radius of not more than 60 miles and the Court held this was within the general vicinity.

Walling v. *Yeakley*, District Court of Colorado:

The Court held the limitation of general vicinity was fair and reasonable but, since the defendant obtained some 18% of its product from counties far removed—some 300 miles distant, the employer was not within the general vicinity.

Walling v. *McCracken County Peach Growers Ass'n*, Western District of Kentucky:

The peaches involved in that case were all received from a radius of approximately ten miles.

Bruno v. *The Hills Bros.*, District Court of Puerto Rico:

The commodity consisted of grapefruit and pineapples grown on a strip approximately ten miles wide and 100 miles long along the northern central coast of the island. The Court held this within the general vicinity.

Holt et al. v. *Barnesville Farmer Elevator Co.*, District Court of Minnesota:

Some 98% of the commodity was obtained from within 15 miles of the establishment and the balance at various ranges up to 25 miles which the Court held was within the general vicinity.

9. Cases Generally Holding Definitions Void.

Most of the cases passed on one or more of the elements of the definitions but

Byus v. *Traders Compress Company*, Western District of Oklahoma,

generally holds the definition promulgated by the Administrator to be capricious, arbitrary and entirely void and

that the employees in that case, where the cotton was obtained not more than 175 miles distant from the compress, were within any reasonable definition of area of production and within any valid definition of that term which might be promulgated by the Administrator.

10. CASES GENERALLY HOLDING DEFINITIONS VALID.

Fleming v. *Lincoln Loose Leaf*, Eastern District of Tennessee:

The memorandum for judgment fails to set forth the facts but the Court holds that the defendant is not exempt because its employees worked within the area of production. From the memorandum, it is impossible to state whether the definitions were attacked in that case or what the facts were upon which the Court based this conclusion.

Walling v. *Home Loose Leaf Tobacco Warehouse*, Eastern District of Kentucky:

Although the Court did not pass upon the validity of the definitions, it did hold that since 20% of the total volume of the commodity handled came from other states and from Kentucky counties, remote from the establishment, the employer did not obtain its commodities from the general vicinity.

It is, of course, realized that decisions by District Courts are not binding on this Court but, by referring to these cases, we do find the trend of judicial thinking.

The vague and indefinite regulations which have been many times changed and amended, have given rise to litigation all over the country and the large number of judges of the District Courts have almost unanimously held the definitions arbitrary, capricious and void. In the foregoing list of cases, there are a few where the courts very properly did not pass upon the validity of the definitions because of the particular facts of the case, some where the number of employees was less than seven,

some where the commodities were obtained from such a far distance that the employer could not be within any reasonable definition of area of production. However, where it has been necessary for the courts to squarely rule upon the validity of these definitions, we find, with one or two exceptions, a unanimity seldom reached by the judiciary. The only Circuit Court of Appeals which has passed on these definitions has added its endorsement and squarely taken its place among those holding the number of employees limitation absolutely void. The first time the Court of Appeals made such a ruling in the *Farmers Peanut case, supra*, the Administrator was a party to that suit but did not even file a petition for certiorari to this Court. If, as he says in this brief *amicus curiae*, the decision in this case is of such importance to him, why did he not ask this Court to rule upon the point the first time it was decided by the Circuit Court of Appeals?

(g) Findings of the District Court.

In order to give a complete adjudication of the points at issue, it may be necessary for this Court to consider some of the facts not specifically covered in the opinion of the Circuit Court of Appeals. As an example of this situation, we call attention to the fact that the District Court made findings and rulings involving the claimed exemption of 14 weeks under Section 7(c) and the claimed exemption under Section 7(b)(3) of the Act. In view of the conclusion reached by the Appellate Court, it became unnecessary to consider these conclusions at all.

Some of the findings of the lower court were in conflict with admitted facts in the case and there was practically no conflict in the testimony; some of the findings were based upon erroneous conclusions of law. Exceptions to the findings of the lower court were amply preserved by the Respondent to the Appellate Court.

It is recognized that this Court will not set aside findings of a lower court unless clearly erroneous, but it is sub-

mitted that the findings and conclusions of the District Court were clearly erroneous in the following particulars:

1. First, the Court finds that the Respondent operated a commercial canning plant (R. 186). If by that the Court means that the Respondent was not a cooperative, then it is in direct conflict with the evidence because the evidence shows it was incorporated as a cooperative—Exhibit A (R. 150)—handling fruit for the account of its members and, in addition, purchasing fruit and all of the profits inured directly to the benefit of its members. The Appellate court so found (R. 224).

2. In paragraph VII (R. 192), the court finds that the Respondent "throughout said two seasonal periods of operation" did not obtain all of its commodities from farms in the "immediate locality" or "general vicinity" as defined by the Administrator. In the first place, the Court failed to recognize the fact that "immediate locality" definition only covered the first five months during which time "immediate locality" was undefined by the Administrator, and that for the last 30 to 40 days "immediate locality" was defined as meaning ten miles and within a town of 2,500 or less population (The Administrator evidently realized the phrase "immediate locality" was too indefinite in itself and needed some defining). "General vicinity" is just as indefinite but he has never attempted to define it.

It is well to remember that the Fair Labor Standards Act is at all times to be construed by the workweek. The Administrator has stated that the plant may be in the area of production one week and out of the area next week, dependent primarily upon the distance of the haul, and in his regulations, among other things, he has stated that an employee must be construed to be under the Act during the entire work week if he performs services during any part of the week which are subject to the Act. Therefore, to justify the Court in holding the Respondent was not

within the "area of production" during the two seasonal periods of operation, he must make a finding as to each work week therein.

3. In paragraph VII (R. 192), he finds "an appreciable portion thereof came from a distance beyond the range of usual farm travel." This is in direct conflict with the *admitted* facts in the case which were alleged in paragraph 3 of the Fifth Defense (R. 13, 144). Thus the uncontradicted evidence shows the range of usual farm travel to be at least 100 miles and the evidence likewise conclusively shows that *all* of the products used by the Respondent during the entire two seasons were obtained many miles nearer the establishment than the range of usual farm travel. In said paragraph VII, the Court likewise finds that the general vicinity of the Respondent's establishment is not sparsely settled because there were several towns and communities within a radius of ten miles and that some of the fruit used came from varying distances up to 20 miles. *If* the Court construes "immediate locality" in the first definition to mean ten miles and *if* the Court holds such a definition to be valid, then the very small portion (less than 3%) came from beyond ten miles during the first season. Therefore the plant would not be within "area of production" for any work week in which it obtained fruit from beyond the ten miles. However, even in a circumstance like this, the rule of *de minimis* would certainly apply. It will be noted that the Court did not make any findings as to the respective seasons, and all during the second season the establishment was operated under a "general vicinity" definition.

4. In Paragraphs VIII (R. 192) and G of said order (R. 196), the Court finds that the establishment of the Respondent was not within the area of production because there was located within the range of usual farm travel "at a point not more than four miles away" a town of more than 2,500 population. Admittedly, Haines

City, a town of slightly in excess of 2,500, is located some 4 miles from Respondent's establishment but it was never intended that this should prevent the establishment from being within the "area of production." Nowhere in any interpretations, rulings, or orders of the Administrator, nor in any Court decision have we found such a contention. A mere reading of the Administrator's definition clearly convinces one that the Administrator never so intended and we again urge the Court to bear in mind that the population criterion could apply only to some 30 or 40 days of the first season. His definition of "open country" or "rural community" as contained in the amendment is "shall not include any city or town of 2,500 or greater population." He did not say it should not include a location within ten miles or within the range of usual farm travel of a town of 2,500 or more. Certainly, the Administrator in his zeal to delimit the phrase "area of production" never intended such. Undoubtedly, he was attempting to exclude from the exception those plants located in large cities with a source of labor supply non-competitive with the rural sections.

5. In paragraph IX (R. 193) of the findings of fact and paragraph F of the conclusions of law (R. 196), the Court reaches the conclusion that the ten mile haul in the definitions means "by the shortest available road route, but not a radius distance 'as the crow flies' from the plant."

In rural sections some roads may be used at times and other roads at other times dependent upon the weather, as well as many other causes. If the lower court is correct, then a farmer before hauling his fruit to a cannery must go out and measure the road distances to the cannery to determine which, if any, are within the ten miles, also ascertain whether any of the roads will be closed or impassable, and, with such information, then determine to whom he will sell his fruit. If a body of water lies between the grove and the plant, necessitating a circuitous route of eleven miles, although the grove may

be located many miles nearer, that fruit does not come from the area of production. If one grove owner has access to a direct road to the canner while his neighbor does not, then we find one grove in the area of production while the neighboring grove is not. If two groves are equidistant from the plant but the road to one is straight and his mileage is less than ten miles, he is in the "area of production" while the road leading from the other grove may have curves which lengthen the average road mileage to an excess of ten miles and thereby throws him out of the "area of production." Numerous other examples could be given to show the fallacy of such a holding.

6. In paragraph A of the conclusions (R. 194), the Court decides that if the several applicable definitions of "area of production" are void, the Respondent is not entitled to the exemptions under Section 13(a)(10).

The Court of Appeals in the *Farmers Peanut case, supra,* clearly answered that contention when it said "But if we ought to hold the entire definition void, we say that a failure to define would not enable the Administrator to prevail. It may be that the Court cannot define for him, but it should withhold its aid in the effort to override the exception which needs his definition, until he meets the need lawfully. To do otherwise would be to flout the expressed will of Congress."

The trial judges in *Fleming* v. *Farmers Peanut Company,* 37 Fed. Supp. 628, *Walling* v. *McCracken Peach Growers Asso., supra,* and *Shain* v. *Armour & Company, supra,* discussed the effect of holding a portion of the definitions invalid and reached the conclusion that the exemption provided by Section 13(a)(10) could not be taken away or defeated by an invalid definition and in effect said that the operations were within any reasonable definition of area of production. The other district courts holding the entire or parts of the definitions invalid have simply ruled that the operations were within the area of production.

Judge Yankwich, in *Redland Foothills Groves* v. *Jacobs, supra,* by *obiter dictum* stands alone on the theory of the petitioners that there is no exemption unless and until the Administrator has promulgated a valid definition of area of production.

The Congress gave the exemption and the Administrator cannot thwart the expressed will of Congress by withholding the definition or by failing and refusing to promulgate a reasonable definition in accordance with his duties under the Act.

7. In paragraph D of the conclusions (R. 195) the Court holds that the limitation of the number of employees in the definitions is valid and at other places in this brief the Respondent has shown clearly that such conclusion of law is erroneous.

8. In paragraph E of the conclusions (R. 196) the lower court attempts to justify its failure to follow the decision of its own appellate court in the *Peanut Case, supra,* in connection with the number of employees limitation by saying that the factual circumstances are different without designating the differences whatsoever. The only difference is that this is a suit by employees and the Peanut Case was a suit by the Administrator. If the limitation as to the number of employees is void against the Administrator, it is likewise void against any persons claiming the benefit thereof.

9. In Paragraph H of the conclusions (R. 196) the Court holds that because in the Fifth Defense as amended, which is an affirmative defense based upon area of production, this Respondent did not specifically say that another provision of the Act was complied with, the Respondent thereby admits a violation of the other provision. However, the Court overlooked the fact that this Respondent in the Second Defense denies any violation of the Act. Even before the adoption of any Federal Rules of Procedure a defendant could file inconsistent defenses; the new rules clearly so provide (Rule 8 (e)). Therefore,

the Court came to the conclusion that the Respondent was not within the area of production because it had violated some provision of the Act; that one expressly exempt from the provisions of an Act loses his exemption if he does not comply with the Act. Under such a theory, no establishment operating within the "area of production" could ever claim its exception if it violated any other provision of the Act—in short, no employer could ever be exempt under Section 13(a)(10).

10. Finally, in Paragraph I of the conclusions (R. 197) the Court holds in effect that a canning establishment can never be within the "area of production" if it is in competition with other canning establishments or if a farmer in the vicinity is doing any canning. There is nothing in the Act, the definitions, or any interpretations that would warrant such a holding. If the same be true, any canning establishment can be put out of the area of production by the simple expedient of having a neighboring farmer start canning some of his own products.

Finally, may we again urge the fact that the entire findings of fact and conclusions of law were erroneous in not recognizing and conceding that there were two seasons involved and two different definitions and the amendment involved. By attempting to apply the "immediate locality" definition to the two seasons, he has completely overlooked the fact that this definition did not extend beyond the first season. Again, we emphasize the fact that the Wage and Hour Act must be interpreted on a work week basis, not on a monthly basis nor a seasonal basis. The issue before the lower court was whether the defendant was within or without the area of production during *each* of the work weeks involved. The lower court just wiped this aside and treated it from a standpoint of the total period involved in the suit.

(h) Administrative Hearings.

Petitioners refer to the hearings of the Wage & Hour Division and particularly to an administrative hearing conducted by Mr. Merle D. Vincent, on behalf of the Administrator, which is the only hearing involving citrus.

Mr. Vincent's findings and recommendations were rendered on March 14, 1939. He points out that the scope of the hearings was "what, if any, amendment should be made of Section 536.1 or Section 536.1 of the regulations issued under the Fair Labor Standards Act of 1938 in respect with the definition of 'area of production' for fresh fruits and vegetables." Then he emphasized the fact that the breadth of the problem was reflected in the widely representative capacity of the persons who appeared at the hearing. His findings consist of approximately thirty-four pages and his recommendations of one page.

There is contained in the findings:

"In Florida, where the citrus acreage is spread over a large part of the State, average hauls are frequently longer and maximum hauls go up to two hundred and fifty miles in some cases."

"In Florida, the normal, rather direct movement from farm to nearby packing house, is somewhat distorted in some instances by a choice of packing house with reference to further shipment."

"The important Florida citrus canning industry, operating for about six months a year, procures part of its citrus direct from the groves and part from packing houses. There are only 50 citrus canneries in the State in comparison with 350 packing houses; accordingly some fruit is hauled to the canneries over 200 miles and the average haul is longer than the haul to the packing house."

"While there may be some home canning with equipment operated by 7 or fewer persons, it is the opinion of all witnesses that any commercial cannery must employ a greater number of persons. The

actual number of employees varies greatly" (This is the only reference to the number of employees limitation.)

"The definition to be adopted must therefore be directed toward the relation of the plant to the farmer with the three qualifications of (1) geographical immediacy, (2) rural character of the community in which the plant is situated, and (3) relation of cost factors to the farmer's income for his produce."

His recommendations are that Section 536.2 of the Regulations issued under the authority of Section 13(a)(10) of the Fair Labor Standards Act of 1938 be further amended by the addition thereto of the following:

"(e) with respect to perishable or seasonal fresh fruits and vegetables, if he is engaged in handling, packing, drying, storing, preparing in their raw or natural state, or canning such products for market in an establishment which is located in the open country or a rural community, and obtains its products from farms in its immediate locality and performs such operations for the account of the grower of such product.

"As used in this sub-section (e) 'open country' or a 'rural community' shall not include any city of *twenty-five thousand* or greater population according to the 15th United States Census, 1930, and 'immediate locality' shall not include any distance of more than *fifty miles*, provided, however, that if the establishment is located in a somewhat larger city or obtains the products from a somewhat greater distance, and the nature of the business and the type of operations are similar to those in competitive establishments included within the 'area of production' under this sub-section, the Administrator may determine that such establishment is also in the 'area of production' on the basis of an individual application."

With these recommendations before the Administrator, he issued his regulation of April, 1939, changing the recommendation of the twenty-five thousand population

to twenty-five hundred and cutting down the recommendation of the fifty-mile haul to ten miles.

Respondent does not question the fact that the several Administrators have fully realized the several definitions of area of production were not sufficient and have made repeated changes or amendments. It is contended, however, that none of these definitions or amendments were promulgated with any reasonable effort to carry out the intentions of Congress but all show an underlining purpose of delimiting the granted exception under Section 13(a)(10) to an extent never contemplated by Congress.

Neither does Respondent contend that the Administrator did not hold any hearings or have any conferences with representatives of the industry. From the time of the first definition in October, 1938, the citrus industry has made repeated efforts to get a reasonable definition and this industry participated in the hearings by Mr. Vincent, above referred to. However, all conferences and hearings have been to no avail. The Biblical quotation, "For what is a man profited, if he shall gain the whole world and lose his whole soul?" might be very applicable to the situation here. What good has been accomplished, what relief granted even though numerous hearings and conferences may have been had from time to time? The requirement that hearings be had by Administrative bodies has many times been emphasized by this Court. To emphasize our point, we suggest the following absurd example: suppose the Administrator had said that the area of citrus is a circle with the trunk of the tree as the center and a radius of two feet, and that every individual in the citrus industry had appeared before the Administrator, after which he had amended his definition of area of production so that the area of production would extend three feet from the trunk of the tree instead of two feet; the fact that a hearing had been had would not make such a definition valid. If the definitions of the Admin-

istrator involved in this case are invalid because they are in conflict with the Act and with the legislative intent, are arbitrary and capricious, the fact that testimony was taken by the Administrator does not breathe validity into such definitions.

(i) Proper Elements to Be Considered by the Administrator in Promulgating Definitions.

It is not thought that this or any other court will assume the responsibility and duty of the Administrator by defining "area of production" for him. This is his duty and not that of the Court.

However, with the state of confusion that now exists throughout these United States caused by the Administrator's continuous efforts to delimit the exemption granted by Congress and thereby assuming legislative prerogative and with the Administrator saying to this court in his *amicus curiae* brief that he is in a quandary as to what to do, it certainly would be to the interest of the public if this Court would announce some of the proper elements which ought to be considered by the Administrator in promulgating a definition that would stand attack in the courts. Judge Waller, in his concurring opinion (R. 228-231), fully recognized this situation and has expressed, beginning on page 230, several factors that might be of assistance to the Administrator in performing his duty.

We have at all times felt that Congress intended separate definitions applicable to each commodity, or at least to a group of commodities rather than one definition for the entire country. If Congress had intended the latter, it would have defined area of production itself. It is fully realized that the area of production of the commodities in the wide open spaces of this country is entirely different from that in the more thickly populated areas. It is recognized that the producing area for cotton, corn, peanuts, onions, citrus and other commodities varies in expansion which is governed almost entirely by nature. The Ad-

ministrator says that different definitions for different commodities are not practical because the task is difficult. The amount of effort necessary to comply with the instructions of the Congress is no criterion to be considered by the Administrator and cannot be used as an excuse for his failure to perform his duties.

Florida is blessed with a network of fine roads running through the citrus belt which situation fully explains the admitted fact in this case that the range of farm travel is in excess of 100 miles throughout the area of production of citrus in this state. The groves are situated throughout 39 counties (R. 13) with a few scattered groves in other counties. Packing houses, canning plants, and waste disposal plants are likewise situated throughout these counties, having been established at points near the producing areas.

The District Judge in *Cox* v. *Swift & Company, supra,* fully appreciated the thoughts that we have attempted to express when he said:

> "Congress found it difficult or impossible to define same within a reasonable space, otherwise it would not have delegated that authority to the Administrator. On the other hand, the Administrator himself even found it very difficult, if not an impossible task, to make the area of production certain by any definition. In fact, it strikes me as being impossible for it ever to be defined to make it apply to any and every situation that might arise. This follows for the obvious reason that the 'area of production' in states more or less sparsely settled and of great distances would not be workable in densely populated areas, for example, like in the states of New England. We can readily appreciate the difficulty of making one definition to fit all the area of production in the United States."

Judge Nordbye in *Holt* v. *Barnesville Farmers Elevator Company, supra,* emphasized the fact that good roads lead to the establishment of the employer for many miles

out in the country and the farms from which the employer received its commodities were located on and near these roads. He also emphasized the capacity of the establishment for handling the commodities.

The District Judge in *Bruno* v. *Hills Bros, supra,* commented upon the size of the island where the grapefruit was grown, the availability of canning plants, the density of population, the complete network of roads, and the preponderance of agriculture on the island.

In determining what elements are proper to be considered by the Administrator, it must at all times be borne in mind the intent of the Congress was not only to exempt the farmer from the operation of the Act but also to exempt it from the immediate effects of the Act; that it intended to refrain and did refrain from adding to the farmer in the preparation and marketing of his crop, any burden and expense which might be caused by the Act.

With this clear intention in mind, the elements suggested by Judge Waller are necessarily factors to be taken into consideration in carrying out the intent of Congress. These he lists as (R. 23) "(a) availability of other canning plants; (b) freedom of access by good roads; (c) capacity of the canning plant to handle the produce; (d) the efficiency of the plant; (e) quantity of produce raised in the area in relation to plant capacity; (g) and in case of a cooperative cannery (as in the present case) the location of the members of the cooperative." He further points out, "there are many factors of far more relevancy or pertinency than the number of employees or the population of the town in which located, or the radius of an arbitrary circle" (R. 231).

We are confident that all parties to this litigation, as well as the thousands upon thousands of employees and employers who do not know and cannot know their rights and obligations under Section 13(a)(10) of the Act, would heartily approve any statements by this Court that would clarify this most confusing situation.

2. Partial Exemption Under Sections 7(c) and 7(b)(3).

Heretofore, our comments have been directed solely at Section 13(a)(10) of the Act because we confidently believed the same to be the main issue in this case. A ruling that the Respondent was within the area of production and, therefore, entitled to the benefits of the exemption under Section 13(a)(10) will, of course, dispose of this litigation but should the Court not so hold, it then becomes necessary to rule upon the claimed partial exemptions. These exemptions apply only to the hours provision of the Act and have nothing whatever to do with the minimum wage provisions.

Although the lower court ruled upon these two points, the same were not mentioned in the opinion by the Circuit Court of Appeals because that Court reached the conclusion that the Respondent was not subject to the Act.

As we understand the prior decisions of this Court, the case might be remanded to the Circuit Court of Appeals for a ruling on these two points or, in order to do complete justice and avoid unnecessary delay in litigation, these points might be handled by this Court. Undoubtedly, the latter procedure would be preferable and agreeable to the parties litigants.

Section 7(c).

Section 7 of the Act provides for the payment of time and a half after 44 hours during the first year of the Act, after 42 hours during the second year of the Act; and after 40 hours thereafter (App. 81). Paragraphs (b) and (c) of Section 7 contain numerous exemptions from the overtime provisions and the particular provision relied upon by this Respondent is an exemption not to exceed 14 workweeks in the aggregate of any calendar year to an employee "or in canning, or packing, perishable and seasonal fresh fruits or vegetables." Following the provisions just quoted, we find a similar provision to an em-

ployee "or in the first processing within the 'area of production' (as defined by the Administrator) or any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock."

Petitioners have not appreciated the fact that this Respondent is claiming the fourteen weeks exemption under the first quoted provision and that area of production had nothing whatsoever to do with this exemption. The Congress gave the exemption to employees engaged in canning seasonal fresh fruits or vegetables. It likewise gave an exemption to employees engaged in first processing within the area of production. Respondent is not claiming the exemption on the theory that the employees were engaged in "first processing." Respondent was canning seasonal fresh fruits and, therefore, entitled to that exemption.

During the calendar year of 1938, the Respondent operated approximately 7 workweeks after the effective date of the Act (R. 147). It, therefore, claims the benefit of the quoted portion of Section 7(c) of these seven workweeks. In other words, if the contention of the Respondent is correct, it is not liable to the employees for any overtime during those 7 workweeks.

During the calendar year 1939, it operated 21 workweeks (R. 147 where 21 is erroneously shown as 31—a computation of the weeks between the dates shown will show that 21 weeks is correct) as to fourteen of these workweeks, this Respondent claims that it is not liable for the time and a half overtime because of the quoted section of Section 7(c). If this contention be correct, there is left a total of 7 workweeks during which the Respondent would have claims for the overtime.

During the 1940 season, the plant was in operation for a period of some 13 workweeks and this Respondent claims an exemption for overtime during the entire thirteen (13) workweeks under Section 7(c).

Therefore, if this Court should hold that the services of the Petitioners were subject to the requirements of the Act during the two seasons involved, there would only be a period of 7 workweeks involved overtime.

This partial defense was set forth by the Respondent in its fourth defense (R. 12) which was stricken by the Court (R. 198). The action of the Court was founded upon its order of January 26, 1943, findings, paragraph F (R. 200) which findings may be summarized as follows:

1. Respondent is not entitled to claim the exemption because it failed to designate the workweeks during which time it is claimed the exemption applied.

These workweeks were not designated at that time because (a) the Respondent believed that it was within the area of production and exempt from the Act and (b) the District Court of the Southern District of Florida, in *Lake Wales* v. *Janes, supra*, had declared this Respondent to be exempt from the Act and enjoined the enforcement of the Act, which injunction remained in force and effect throughout the two seasons involved in this case.

The lower court in *Missell* v. *Overnight Motor Transportation Co.*, 40 Fed. Supp. 174 (thereafter in this Court as *Overnight Motor Transportation* v. *Missell*, 316 U. S. 572, 86 L. Ed. 1682), considered the failure of the employer to keep its records in compliance with the Act and pointed out that its failure so to do was excused by reason of the fact that the District Court of the District where the employer was located had rendered a decision to the effect that employees, such as the employees in the Missell case, were not subject to the provisions of the Act and that this decision had not been reversed. The situation is very similar to our case because the District Court had rendered a decision that this Respondent was not under the Act and the case had not been reversed, although it was later reversed by the Circuit Court of Appeals on a jurisdictional question.

The Court can readily understand the position of this employer during the time of the injunction in the *Janes case, supra.* The Administrator would not submit to the jurisdiction of the District Court and, therefore, as held by the appellate court, the employer was helpless to obtain a declaratory judgment.

The Administrator would not file within the District a suit to enjoin any alleged violation of the Act so that the Respondent could obtain an adjudication of its rights. Was the employer to designate on its books the workweeks it claimed under Section 7(c) and run the risk of having it contended that he had waived any provisions under 13(a) (10)? Under the confused situation caused by the definition of the Administrator, what was the employer to do?

It is respectfully submitted that if this Honorable Court should hold the services of the Petitioners were covered by the Act, the defendant is entitled to the exemption from the overtime penalties as set forth herein.

2. The District Court held the Respondent in this particular defense did not deny the violation of the Act.

As we have heretofore pointed out, the Respondent in its second defense (R. 7) (10) had denied any violations.

3. That the claim for exemption under Section 7(c) is inconsistent with the claim for exemption under Section 13(a) (10).

Assuredly, a defendant may plead inconsistent or alternative defenses. The Respondent contended that under Section 13(a) (10) it was not bound by the Act in any manner. In its Fourth Defense, it in effect said that if the Act did apply it was entitled to the partial exemption.

4. That the designation of the partial 14 weeks to be exempt is a matter of agreement between the employer and the employee and the Respondent fails to allege any joint designation.

To state this point is to answer it. There is nothing in the Act, in the history of the legislation, or in any of the numerous regulations of the Administrator to warrant any such idea. According to this theory, no employer could ever use such an exemption because it is inconceivable that an employee would deliberately forego any compensation to which he might be entitled.

5. Where the employer has already settled with the employee without claiming the exemption under 7(c), he cannot go back and claim that exemption.

This point needs no argument and to follow the District Judge's theory, an employee could never ask for overtime because the account had been settled and closed.

As we understand the findings of the lower court, the services of the Petitioners fell within the exemption but the Respondent cannot claim the same.

Very little litigation has arisen involving Section 7(c). However, the Circuit Court of Appeals for the Seventh Circuit, in *Walling* v. *Swift & Co.*, 131 F. 2d 249, dealt with this section and held that the employer was entitled to apply the exemption to each of its employees.

Section 7(b)(3).

In addition to the fourteen workweeks exemption set forth in Section 7(c), Congress likewise granted a further exemption of not more than 14 workweeks in an industry found by the Administrator to be of a seasonal nature but even during these workweeks, time and a half had to be paid for services in excess of 12 hours in any work day or in excess of 56 hours in any workweek. This is commonly referred to as the partial exempt weeks. This contention set forth in the third defense (R. 10-12) was likewise stricken by the Court (R. 201) primarily on the ground that the Administrator did not make his determination that the citrus industry was of a seasonal nature until August 24, 1940, which was a date subsequent to the pe-

riods in controversy in this cause (R. 199). This brings us back to a thought heretofore urged with reference to the definition of area of production, *i. e.*: Can the Administrator withhold an exemption granted by the Act by refusing to perform his duties?

The pleadings show that there had been no change in the seasonality of the industry, in the mode of operations or any other changes that made the situation different during the seasons referred to in this suit than they were at the time of the determination by the Administrator. The citrus industry is admitted highly seasonal and is uniformly so recognized. The fruit must be handled when ripe. Certainly, the employer is not to be penalized, is not to be deprived of his exemption granted by Congress because the Administrator delays or fails to make his finding. There is no question that the industry is seasonal. The only question is whether the Administrator can make it nonseasonal by refusing to declare it seasonal. Suppose the Administrator had arbitrarily said that the industry was not seasonal and suppose, further, that long drawn out litigation over a period of years was necessary to correct this error. Justice would require a holding that the employer not be deprived of his rights during such a time.

Petitioners contend that an employer is not entitled to the exemptions under both Sections (c) and (b)(3) of Section 7. The Administrator in his release 974, states:

> "It is the position of the Administrator that the exemptions in Section 7(b)(3) and (c) may operate consecutively as a matter of law."

Congress recognized that there are peak weeks in a seasonal industry during which time the commodity must be handled as rapidly as possible, during which time long hours are absolutely necessary to preserve the fruit and it, in effect, said that during fourteen workweeks of any calendar year, an employee could run long hours when en-

gaged in canning seasonal fresh fruits—Section 7(c). This was to take care of the peak weeks. Congress likewise recognized that during other times in the season, it was necessary to run hours longer than the minimum hours set forth in the Act, and, therefore, granted an additional exemption under Section 7(b)(3), provided the hours did not exceed 12 hours in one day or 56 hours in one week.

IV. CONCLUSION.

Because of the many points involved in this litigation, it has been necessary to prepare a rather lengthy brief but when it is boiled down there are only a few prime points:

1. Were the services of the Petitioners rendered within the area of production?

2. If these services were not within the area of production is the employer entitled to the benefit of the total 14 weeks exemption from the overtime provisions of the Act?

3. If the services were not within the area of production, is the employer entitled to the benefit of the partial exempt weeks?

In deciding the first point, the Court must consider the validity of the definitions promulgated by the Administrator, the validity of the different factors or limitations considered in these definitions and the effect of invalidity of portions of the definitions.

It is respectfully submitted that the Respondent has shown that the definitions involved and each of them are severally invalid as being unconstitutional, arbitrary, capricious, and exceeding the authority of the Administrator, that the services of the Petitioners were performed within the actual area of production of citrus and would fall within any reasonable and valid definition of area of production.

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

R. B. HUFFAKER,
CHAS. O. ANDREWS, JR.,
COUNTS JOHNSON,
G. L. REEVES,
Attorneys for Respondent.

Of Counsel:

R. B. HUFFAKER,
Bartow, Florida,

COUNTS JOHNSON,
Florida & Oak,
Tampa, Florida,

ANDREWS, PATTERSON & LAVIN,
Florida Bank Building,
Orlando, Florida,

SUTTON, REEVES & ALLEN,
P. O. Box 2111,
Tampa, Florida.

APPENDIX A.

Definitions of Area of Production.

(1) The Administrator promulgated on October 20, 1938, Section 536.2 of the Regulations, purporting to define "area of production" as follows:

> "Section 536.2 'Area of Production' As Used in Section 13 (a) (10) of the Fair Labor Standards Act. An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10), in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products,
>
> (a) if he is engaged in such work on a farm and on agricultural or horticultural commodities produced exclusively on such farm, or
>
> (b) if the agricultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediate locality and the number of employes in such establishment does not exceed seven."

(2) That regulation remained in effect through April 19, 1939, when (following a series of administrative hearings,) he promulgated, effective April 20, 1939, an additional paragraph to said Regulation 536.2, as follows:

> "(e) with respect to perishable or seasonable fresh fruits and vegetables, if he is engaged in handling, packing, storing, drying, preparing in their raw or natural state, or canning such products for market in an establishment which is located in the open country or in a rural community and which obtains all of its products from farms in its immediate locality. As used in this subsection (e) 'open country' or 'rural community' shall not include any city or town of 2,500 or greater population according to the 15th

United States Census, 1930, and 'immediate locality' shall not include any distance of more than 10 miles."

(3) On June 15, 1939, effective June 17, 1939, the Administrator again amended said Regulation, as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10), in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(a) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven, or

(b) with respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this subsection (b), 'first concentration point' means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment normally receiving a portion of the beans assembled from other first concentration points, or

(c) with respect to Puerto Rican leaf tobacco, if he is engaged in handling, packing, storing, and drying such tobacco for market in an establishment which is a first concentration point for such tobacco. As used in this subsection (c), 'first concentration point' means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing, or

(d) if he performs those operations on materials all of which come from farms in the immediate lo-

cality of the establishment where he is employed and the establishment is located in the open country or in a rural community. As used in this subsection (d), 'immediate locality' shall not include any distance of more than ten miles and 'open country' or 'rural community' shall not include any city or town of 2500 or greater population according to the 15th United States Census, 1930."

(4) On July 23, 1940, effective October 1, 1940, the Administrator again amended said Regulation as follows:

"II. An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10), in handling, packing, storing, drying, preparing in their raw or natural state, or canning of perishable or seasonal fresh fruit or vegetables for market:

if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten."

(5) On March 12, 1941, effective April 1, 1941, the Administrator again amended said Regulation as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(a) If he performs those operations on materials all of which come from farms in the general vicinity of the establishments where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten, or

(b) with respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this sub-section (b),

'first concentration point' means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment normally receiving a portion of the beans assembled or from other first concentration points, or

(c) with respect to Puerto Rican leaf tobacco, if he is engaged in handling, packing, storing, and drying such tobacco for market in an establishment which is a first concentration point for such tobacco. As used in this sub-section (c), 'first concentration point' means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing."

(6) On October 6, 1941, effective January 5, 1942, the Administrator again amended said Regulation, as it is now currently in effect, as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(a) If he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten, or

(b) with respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this subsection (b), 'first concentration point,' means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment

normally receiving a portion of the beans assembled from other first concentration, or

(c) with respect to Puerto Rican leaf tobacco, if he is engaged in piling, bulking, or otherwise handling unstripped tobacco for market in an establishment which is a first concentration point for such tobacco; provided that employees engaged in stripping tobacco or engaged in piling, bulking, or otherwise handling stripped tobacco shall not be deemed to fall within this definition. As used in this subsection (c), 'first concentration point' means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing."

APPENDIX B.

Maximum Hours.

Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as *bona fide* by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as *bona fide* by the National Labor Relations Board, which provides that the employee shall not be em-

ployed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 217

WILMA E. ADDISON, ERNESTINE C. LYLES, EDGAR CAMPBELL, SALLIE BAKER, AND LUTHER BLACK, ET AL., PETITIONERS

v.

HOLLY HILL FRUIT PRODUCTS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This action was brought by employees against a commercial canning company which employs over 200 workers to recover wages and liquidated damages claimed to be due under the Fair Labor Standards Act of 1938. It involves, among other things, the validity of regulations promulgated by the Administrator of the Wage and Hour Division, United States Department of Labor, defining the scope of the exemption provided by Section

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13 (a) (10) of the Act. Section 13 (a) (10) provides an exemption from the wage and hour provisions of the Act for—

> any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products.

The question of validity relates to the numerical limitation in the following definition:[1]

> An individual shall be regarded as employed in the "area of production" within the meaning of Section 13 (a) (10) * * * (1) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven (29 C. F. R. (1940 Supp.) 536.2).

---

[1] The several forms in which "area of production" has been defined are printed at pp. 39–43 of respondent's brief. Alternative tests of "area of production" were also provided in the regulations during the period of this action. At the present time, however, with the exception of special definitions relating to dry edible beans and Puerto Rican leaf tobacco, the only basis for exemption is that quoted in the text, with the number of permissible employees increased from seven to ten. 6 F. R. 5165.

The court below held invalid the requirement that the employees in the establishment not exceed seven, on the ground that the number of employees in an establishment has no relation to the area of production. Applying what it considered the valid portions of the Administrator's definition, after "striking down invalid portions" (R. 228), the court held that respondent's employees were exempt from the Act.

Because of the importance of the questions involved and the need for their clarification the Government requests that the petition for a writ of certiorari be granted.

1. The problem affects large numbers of employers and employees. It is estimated that more than 750,000 employees are engaged in the operations enumerated in Section 13 (a) (10).[2] They are ordinarily low-paid and work long hours, so that the applicability of the exemption in Section 13 (a) (10) would materially affect the administration of the Act. On the basis of the number of employees concerned, annual wage payments of from $25,000,000 to $50,000,000 turn on the scope to be given the term "area of production."

2. Unless the questions presented here are settled by this Court, the Administrator is confronted with serious practical problems. The alternative courses of action open to him are (1) to leave

[2] Estimate of Economics Branch, Wage and Hour Division, United States Department of Labor.

his definition undisturbed pending adjudication by other circuit courts of appeals, or (2) to abandon his present definition in favor of a new one without a numerical limitation. Both alternatives are unsatisfactory. Under the first alternative the courts in the Fifth Circuit would be free to write their own definition of the exemption.[3] Numerous employers and employees in that circuit would be in the dark as to their rights and liabilities unless and until suit was instituted and a determination made in each individual case. Moreover, application of varying definitions in different judicial circuits would cause discrimination among competitors. The second alternative, to adopt a new definition without numerical limitation, would present great difficulties to the Administrator. The Administrator is convinced that other proposed definitions are so impracticable and economically unsound

[3] In other circuits the district courts have reached varying results. With *Redlands Foothill Groves* v. *Jacobs*, 30 F. Supp. 995, 1004–1005 (S. D. Calif.); *Gordon* v. *Paducah Ice Mfg. Co.*, 41 F. Supp. 980 (W. D. Ky.; *Walling* v. *Lincoln Looseleaf Warehouse Co.*, 6 Wage Hour Rept. 68 (E. D. Tenn. 1943); *Cox* v. *Swift & Co.*, 5 Wage Hour Rept. 341 (N. D. Tex. 1942); compare *Byus* v. *Traders Compress Co.*, 6 Wage Hour Rept. 66 (W. D. Okla. 1942); *Shain* v. *Armour & Co.*, 6 Wage Hour Rept. 715 (W. D. Ky. 1943); *Walling* v. *McCracken County Peach Growers Assn.*, 6 Wage Hour Rept. 718 (W. D. Ky. 1943); *Rafael Bruno* v. *The Hill Brothers Co. of P. R.* (D. P. R.), not yet reported; *Holt* v. *Barnesville Farmers Elevator Co.* (Minn.), not yet reported.

that he is loath to abandon the numerical limitation, unless the decision of this Court makes such action necessary.

The present definition was adopted only after lengthy hearings and thorough consideration of the other possible alternative definitions. The drafting of a practicable definition of "area of production" has not been an easy task. Indicative of the complexity of the problem is the fact that there are more than 300 different agricultural and horticultural commodities grown in all parts of the country.[4] Careful study and thorough understanding of the conditions in the numerous industries concerned were necessary to avoid a definition which would cause unjustified competitive inequalities and grave economic dislocations. Several successive Administrators have devoted considerable time and study to the problem. In the period from October 20, 1938, to October 6, 1941, eight definitions or amendments were promulgated.[5] Numerous conferences with

[4] The United States Census lists more than 300 different agricultural and horticultural commodities which are produced in the United States. Farm and Ranch Schedules, U. S. Census of Agriculture, taken by the Bureau of Census, U. S. Department of Commerce, *Sixteenth Census of the United States: 1940.*

[5] Each of these was published in the Federal Register before its effective date: 3 F. R. 2536 (October 22, 1938); 3 F. R. 3072 (December 22, 1938); 4 F. R. 1009 (February 25, 1939); 4 F. R. 1655 (April 20, 1939); 4 F. R. 2436 (June 17, 1939); 5 F. R. 2647 (July 24, 1940); 6 F. R. 1476 (March 18, 1941); 6 F. R. 5165 (October 11, 1941).

United States Department of Agriculture experts were held and many representatives of industry and labor were consulted. Extensive hearings, both formal and informal, were conducted upon the application of various industries. Representatives of the sugar, cotton, grain, tobacco, bean, seed, alfalfa and fresh fruits and vegetables industries were heard at length.* Twenty-four volumes containing more than 4,000 pages were taken at the formal hearings alone. The definition in issue here was adopted after thorough consideration of many other possible definitions. The Administrator considered a flat mileage criterion and concluded that it would not only raise difficult inspection problems but would work grave discriminations, since plants of the same nature and size and competing in the same market, may draw from five miles in the eastern part of the country, and from a hundred miles or more in western parts of the country. He considered the feasibility of "mapping" geographical regions for each agricultural or horticultural commodity and

* See Hearings on Proposed Amendment of Section 536.2 (area of production) of Regulations issued under the Fair Labor Standards Act of 1938, Wage and Hour Division, United States Department of Labor: General hearings, Reference Nos. 162a (4 vols.), 72 (1 vol.); on fresh fruits and vegetables, Reference Nos. 54 (4 vols.), 73 (2 vols.), 162b (3 vols.), 162c (3 vols.); on dry edible beans, Nov. 14–15, 1938 (2 vols.); on tobacco, Reference No. 48 (2 vols.); on poultry, Reference No. 58 (1 vol.); on seed, Reference No. 71 (1 vol.); on alfalfa, Reference No. 373 (1 vol.).

concluded that the enormity of the task alone would make it impossible of execution, and that in any event such a definition would place at a wholly unfair competitive advantage the regions where small diversified farming, rather than specialized production, is practiced. General definitions, such as "general vicinity" and "neighborhood" were rejected because they either amounted to a blanket exemption or provided too indefinite a rule in the absence of other limitations.

In contrast to these proposals, the present definition with its limitation upon the number of employees was believed to involve a minimum of competitive discrimination and to be sufficiently definite. In addition it was felt that it would automatically confine the exemption geographically, because a small plant can absorb only a limited amount of agricultural commodities, and its capacity is normally sufficient only for the products of nearby farms. Thus there is good reason to assume that a test based upon a small number of employees is not dissociated from, but rather implements, the standard of nearness implied in the phrase "area of production." Accordingly, the ruling of the court below that the number of employees has no relation to area of production is certainly questionable.

Under the circumstances the Administrator feels that he should have this Court's decision before abandoning a definition which has been so pains-

takingly contrived, in favor of some other proposal which in his opinion would create grave economic dislocations.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

DOUGLAS B. MACGS,
Solicitor,
United States Department of Labor.

OCTOBER 1943.

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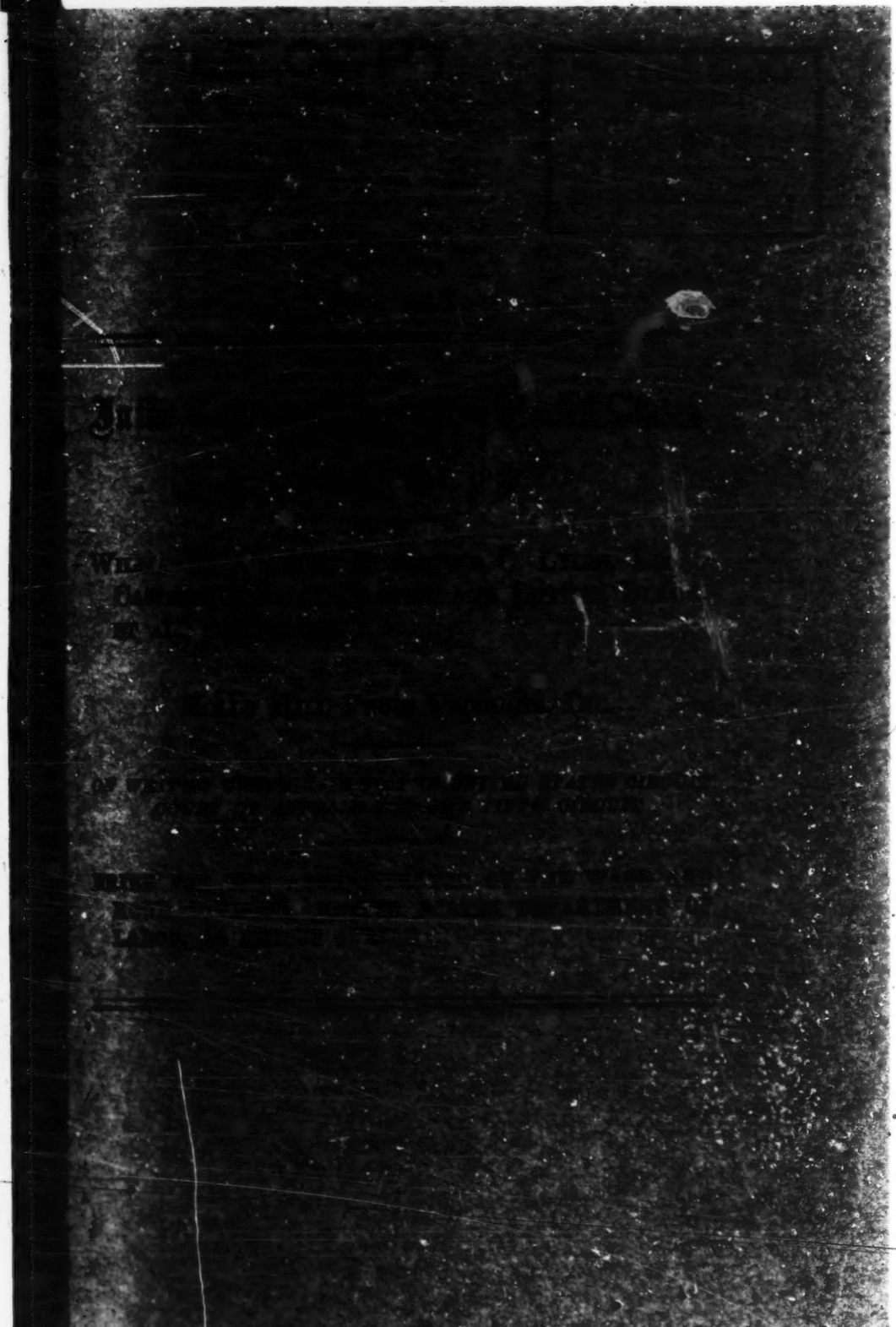

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 217

WILMA E. ADDISON, ERNESTINE C. LYLES, EDGAR CAMPBELL, SALLIE BAKER, AND LUTHER BLACK, ET AL., PETITIONERS

v.

HOLLY HILL FRUIT PRODUCTS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

One of the issues involved in the instant case is the validity of the current definition of "area of production" which was issued by the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to his statutory duty to determine the scope of the exemption contemplated by Section 13 (a) (10) of the Fair Labor Standards Act. Certain other issues are also involved, including the alleged

invalidity of definitions previously in force.[1] The Administrator has no immediate interest in these other issues; accordingly this *amicus* brief on his behalf is confined to the questions (1) whether the current definition is valid and (2) if it is invalid, what is the status of employers claiming an exemption under Section 13 (a) (10) while no valid definition is in force.

OPINIONS BELOW

The District Court's Findings of Fact, Conclusions of Law, and Judgment are not officially reported, but will be found in the Record at pages 186–198, 211–215. The opinion of the Circuit Court of Appeals (R. 224–231) is reported at 136 F. (2d) 323.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 24, 1943 (R. 231–232). The petition for a writ of certiorari was filed on August 2, 1943, and was granted on October 11, 1943. The jurisdiction of this Court is conferred

[1] The several forms in which "area of production" has been defined are printed in Appendix I. Alternative tests of "area of production" were also provided in the regulations during the period covered by this action. At the present time, however, with the exception of special definitions relating to dry edible beans and Puerto Rican leaf tobacco, the only basis for exemption is that quoted at pp. 4–5, *infra*, except that the exemption may be claimed by establishments employing up to ten employees instead of only seven or less.

by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Section 13 (a) (10) of the Fair Labor Standards Act provides an exemption from both the minimum wage and overtime requirements for employees employed "within the area of production (as defined by the Administrator)" engaged in various specified operations relating to the processing and preparation of agricultural and horticultural commodities for market. Under the current definition issued by the Administrator, an employee is employed within the "area of production" when: (a) all the materials on which he performs the specified operations come from farms "in the *general vicinity*" of the establishment where he is employed, and (b) the *number of employees* engaged in those operations in that establishment does not exceed seven. The questions are:

1. Whether the Administrator exceeded his discretion under the Act by limiting the size of the establishments in which employees might be exempt.

2. Whether, if the Administrator's definition is invalid, it was proper for the court to hold respondent exempt.

STATUTE INVOLVED

The statutory provision primarily involved is the exemption in Section 13 (a) (10) of the Fair

Labor Standards Act,[2] which provides that the minimum wage and overtime requirements shall not apply with respect to:

> any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products.

STATEMENT

This action was brought under Section 16 (b) of the Fair Labor Standards Act of 1938, by employees against a commercial canning company which employs over 200 workers, to recover minimum wages and overtime compensation, and liquidated damages, claimed to be due under the Act. It involves, among other things, the validity of regulations promulgated pursuant to Section 13 (a) (10) of the Act, quoted above, by the Administrator of the Wage and Hour Division, United States Department of Labor, defining the term "area of production" as follows:[2]

> An individual shall be regarded as employed in the "area of production" within the meaning of Section 13 (a) (10) * * *

[2] Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201.

> (1) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven. (29 C. F. R. (1940 Supp.) 536.2.)[2a]

The district court found as a fact that neither the "general vicinity" standard (R. 192) nor the number-of-employees test (R. 186–187) of the Administrator's definition had been met. It concluded that the Administrator's regulations were valid and that accordingly the employees were not excluded under Section 13 (a) (10) from the benefits of the Act.

The circuit court of appeals, solely on the basis of the statutory language and without the benefit of the record of the administrative hearings and findings upon which the definition was based,[3]

[2a] The definition quoted above is referred to in this brief as the "current" definition to distinguish it from previous definitions which proceeded on the basis of a mileage-population test. See Appendix I, *infra*. It should be pointed out, however, that on ~~October~~ July 23, 1940, effective October 1, 1940, the definition quoted above was amended to permit the exemption to be claimed by establishments employing no more than ten employees in the specified operations instead of seven as theretofore (6 F. R. 5165).

[3] A list of the administrative hearings held and findings made on the subject is printed as Appendix II. A copy of each of the transcripts of all such hearings and findings has been deposited in the Supreme Court Library.

The Administrator was not a party to the instant action and neither litigant introduced any part of the hearings in

held that the Administrator could not validly include in his definition a limitation on the number of employees, on the ground that the number of employees in an establishment has no relation to the area of production (R. 226). Applying what it considered the valid portion of the Administrator's definition after "striking down invalid portions" (R. 228), the court reversed the conclusion of the district court that all the fruit canned by respondent did not come from the general vicinity of its plant (R. 227) and held that respondent's employees were exempt from the Act.

SUMMARY OF ARGUMENT

Section 13 (a) (10) of the Fair Labor Standards Act exempts from both the wage and hour provisions "any individual employed within the area of production (as defined by the Administrator)" in certain specified occupations. The Administrator's current definition of "area of production" covers those establishments employing less than seven persons which are located "in the general vicinity" of the farms from which they draw farm-

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evidence. In *Fleming* v. *Farmers Peanut Co.*, 128 F. (2d) 404 (C. C. A. 5), in which the Administrator was plaintiff, the Government introduced a comprehensive affidavit reviewing the problems inherent in the task of defining the term "area of production" and the considerations which the Administrator weighed (tr. No. 9899, pp. 247–263). The circuit court of appeals, however, did not mention this evidence in its opinion holding the Administrator's definition invalid.

products. The court below held this definition invalid because it includes a nongeographical criterion with the test of region or space. We submit (A) that contrary to the interpretation adopted by the court below, Section 13 (a) (10) does not forbid the Administrator to combine with a test of region or space a limitation on size; and (B) that the factors on which the definition was based show that it was a reasonable exercise of the discretion granted by the Act.

A. The words "area of production" do not refer to territories or regions alone so clearly as to forbid recourse to other indicia of the legislative intent. It is proper to say that when fruits or vegetables are canned in a factory employing 200 persons, they have moved from the area of farm production into the industrial realm. But even if the phrase "area of production" would not ordinarily be said to suggest a definition embracing function as well as space, nevertheless the Court in construing this Act should examine all relevant materials to ascertain its meaning here. *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 542–544. Those materials show that in Section 13 (a) (10) the term was not intended to forbid such a definition.

When the phrase "area of production" was inserted in the Black-Connery bill, it was probably known to Congress that previously, during dis-

putes concerning the coverage of certain N. R. A. codes, the term had been used in the so-called Wolman definition in an effort to draw the line between farm labor and industrial labor; farm labor was labor employed "within the area of production"; industrial labor was not. Congress must also have known that the controversy was not ended by promulgation of the Wolman definition which confined agricultural labor to employment in certain activities "within the area of production". Immediately, the precise issue involved in the instant case was raised—whether workers in factories which were located in a farming region but which employed so many persons as to be truly industrial, were employed outside the area of production because the size reflected the nature of the work, or within it because the test was one of location alone.

The debates on the Black-Connery bill raised this same problem of drawing a line between agricultural workers on the one hand (who were to be excluded from the Act) and industrial laborers on the other hand (who would receive its benefits). Again, the phrase "employed within the area of production" was proposed as one criterion. Again, it resulted in questions as to what the phrase meant, in the course of which it was asked whether employees in a large industrial establishment located in a farming area were employed in the area of production and therefore to be

exempted from the Act. There was no agreement on the answer. The chief sponsor of the provision stated on the floor that the answer was something to be worked out.

Conscious of the problem, including the precise issue here involved, Congress provided a method for working it out. The Conference Committee inserted after "within the area of production," the words "as defined by the Administrator." Thus, Congress directed the Administrator to determine what was the area of production. It empowered him to decide the questions unresolved in Congress, not because the policies were not clear but because it was necessary to work out administratively their practical application. One such question, expressly mentioned on the floor, would be whether large factories in rural areas are included "within the area of production." The fundamental problem would be to draw the line between industry and agriculture, and plainly in this task considerations of space might not be the only ones that were relevant. We conclude, therefore, that the Administrator was delegated both a broad authority to give the uncertain phrase meaning by application to concrete situations (cf. *Gray* v. *Powell,* 314 U. S. 402) and, more particularly, the power to decide in the light of the purposes of the Act whether to exempt establishments which are located in farming areas, but which are essentially industrial because of their size and position in the trade.

The nature of the problem of defining the area of production also shows that Congress did not intend absolutely to forbid the Administrator to couple a space limitation with other qualifications. It would hardly be possible on the basis of geography alone to draw the line fairly between farm and industrial labor in such a way as to protect farmers and "little farm factories" without needlessly excluding industrial employees from the operation of the broad policy to eliminate substandard wages as rapidly as possible. No purely spatial test would prevent the economic dislocations and unfair competitive advantages which any reasonable definition would have to avoid. Yet Congress laid those duties on the Administrator. It must therefore be taken to have given him power to perform them.

B. Once it is established that the power delegated to the Administrator under Section 13 (a) (10) is not limited to drawing lines on a map or fixing mileage limits, then it can scarcely be argued that the current definition is invalid. The definition is fair, reasonable, and adapted to the statutory ends. This is shown by both the history of the definition and the evidence on which it was based.

Although the court below stated the principle that it should not attempt to legislate or to construct its own definition of "area of production,"

it did in fact apply its own definition in extending the exemption to respondent. The "general vicinity" provision of the Administrator's definition, standing alone, would have an effect altogether different from that sought by the Administrator's definition as a whole. That the Administrator would not have adopted "general vicinity" as the sole requirement of his definition, had he considered the numerical limitation unauthorized, is evident from the administrative hearings prior to its promulgation.

To extend the exemption to respondent in effect involved the exercise of a legislative function which Congress did not confer upon the courts. Assuming the invalidity of the Administrator's definition, there appear only two courses of judicial action available: (1) to extend the exemption to everyone engaged in the operations enumerated in Section 13 (a) (10); or (2) to deny the exemption, at least to those who were not within the terms of the old definition, until the Administrator adopts a valid definition. The first alternative would plainly be at variance with the intent of Congress to limit the exemption and with the well-established principle that exemption from remedial legislation should be strictly construed. The second alternative seems to be the only logical and practicable one. The exemptions should not be extended to respondent, and its employees thereby deprived of the benefits of the

Act, unless it can be said that respondent would be exempt under any conceivable valid definition, which is plainly not true.

ARGUMENT

I

THE ADMINISTRATOR'S CURRENT DEFINITION OF "AREA OF PRODUCTION" IS A VALID EXERCISE OF THE POWER TO DEFINE GRANTED IN SECTION 13 (a) (10)

The Administrator's current definition of "area of production" covers those establishments employing less than seven employees which are located in the general vicinity of the farms from which they draw farm products. The definition was issued upon detailed evidence after long hearings at which all interested persons were given opportunity to be heard. It established a primary test in terms of geography or space (*i. e.*, general vicinity) and supplemented this with a related limitation on the size of the establishments (*i. e.*, employing less than seven persons) in order better to achieve the Congressional purpose and to avoid the competitive inequalities and other economic dislocations which the hearings had demonstrated would follow from a definition in terms of space alone.

The court below invalidated this definition. It held that the term "area of production" refers to "a surface, a territory, a region" and that the power which the statute grants to define "the area of production" does not include the authority to

exclude large establishments which could meet a regional test (see *Fleming* v. *Farmers Peanut Co.*, 128 F. (2d) 404 (C. C. A. 5) on authority of which the instant case was decided (R. 227)). The court below did not have before it the evidence before the Administrator.

The issue on which the validity of the current definition chiefly depends, therefore, is whether the Act, which admittedly vests the Administrator with the power to define the area of production, at the same time forbids him to add to a geographical test a related qualification limiting the size of the establishments exempted.[4] If this question is answered ~~affirmatively~~ negatively, an additional issue is whether the current definition is a reasonable exercise of the delegated power.

On the first point we submit that Congress did not limit the power of the Administrator so nar-

[4] Judge Waller, in his concurring opinion, expressed the view that the Administrator might take various nongeographical factors into account. Judge Waller said (R. 230–231): "Some of the factors that he [the Administrator] might reasonably take into consideration are: (a) availability of other canning plants; (b) freedom of access by good roads; (c) the capacity of the canning plant to handle the produce; (d) the efficiency of the plant; (e) the quantity of produce raised in the area in relation to plant capacity; (g) and in the case of a cooperative cannery (as in the present case) the location of the members of the cooperative." Although Judge Waller apparently believed that the number of employees was irrelevant, it is difficult to understand his position because the number of employees at a plant normally bears a direct relationship to its capacity, which he expressly stated was relevant.

rowly as to forbid him to add other reasonable criteria to a space definition of "area of production" when their use is necessary to achieve the purposes of the Act. On the second point we show that the procedure followed by the Administrator in promulgating it was calculated to achieve a just definition and that the evidence before him clearly establishes that his "choice among possible alternative standards adapted to the statutory end is one which a rational person could have made" (*Federal Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218, 233).

A. SECTION 13 (a) (10) DELEGATES TO THE ADMINISTRATOR POWER IN DEFINING "AREA OF PRODUCTION" TO COUNT AS RELEVANT OTHER FACTORS THAN THOSE THAT CAN BE EXPRESSED IN TERMS OF SPACE ALONE

1. *The term "area of production" does not refer to a region or territory alone so clearly as to forbid recourse to other material evidence to ascertain the legislative meaning.*

"Area of production" is not a term of art having a fixed meaning. Ordinarily, it may connote a region, a physical space, something that can be marked on a map. But even in ordinary usage that is not the only meaning. One speaks of the "area of discourse" or "the area of debate" and it is certainly proper to say, regardless of location, that farm products being canned in a factory employing 200 persons have moved from the area of production into the industrial sphere. Thus,

the historian of the N. R. A. Code of Fair Competition for the Refrigerated Warehousing Industry wrote in 1936 (H. A. Chastka, *History of the Code of Fair Certification for the Refrigerated Warehousing Industry*, N. R. A. files, March 1936, p. 15):

> The fact that a warehouse is constructed for the purpose of preserving perishable commodities by artificial cooling and the fact that the growers bring these commodities the refrigerated warehouse for preservation should necessarily mean that this fruit has been removed from the area of production * * *.

The court below erred, therefore, in holding that the term "area of production" in Section 13 (a) (10) on its face can refer only to a region or territory and thus manifests an intent to confine the Administrator to geographical considerations to the exclusion of all other factors. On the contrary, the term may be correctly used either to describe a territory or region or else to suggest all the factors of geography, economic function and competitive position that divide the agricultural from the industrial realm. And certainly as a matter of usage it does not reveal an intent to exclude those factors. We must look, therefore, to the background of the term, to its legislative history and to the basic policies of the Act to ascertain the meaning.

But even if the usage were not ambiguous, it would be proper to go behind the words. This Court held in *United States* v. *Dickerson*, 310 U. S. 554, 562:

> It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant.

See also *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 542–544; *Holy Trinity Church* v. *United States*, 143 U. S. 457.

2. *The legislative history shows that Congress used "area of production in Section 13 (a) (10), as it had been used under the N. R. A. codes, to draw the line between agricultural and industrial workers, a task involving use of other criteria as well as geographic tests, and that Congress deliberately inserted the words "as defined by the Administrator" to empower the Administrator to draw that line and resolve such issues as whether employees in large canning factories should be exempt as agricultural workers solely because of location.*

The Black-Connery bill did not use "area production" either in the original bill (S. 2475, 75th

Cong., 1st sess.) or in the bill reported by the Senate Committee (S. Rept. 884, 75th Cong., 1st sess.).[8] The term was first used in an amendment suggested by the International Apple Growers As-

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[8] The legislative history of Section 13 (a) (10) is set forth fully in Appendix III, pp. 76–128, *infra*.

The phrase "area of production (as defined by the Administrator)" also appears in Section 7 (c) in a provision granting an exemption from the hours but not the minimum wage provisions of the Act, for a period of not more than 14 workweeks during seasonal operations in each calendar year, to employees of an employer "engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables or in the first processing within the area of production (as defined by the Administrator) of any agricultural or horticultural commodity * * *." The legislative history of this provision, however, sheds no light on the meaning of "area of production." The provision was introduced into the bill by Mrs. Norton, Chairman of the House Committee on Labor, in an effort to draw support away from broader amendments, such as the Biermann amendment which became Section 13 (a) (10), granting exemptions from both the wage and hour provisions. 83 Cong. Rec. 7401, 7419. The proposed amendment was adopted on the floor without discussion of the meaning of the term "area of production." 83 Cong. Rec. 7419–7423. The additional words "as defined by the Administrator" were inserted by the Conference Committee at the same time that the same words were inserted in Section 13 (a) (10). See pages 29–30, *infra*.

Another proposed amendment using a term somewhat like "area of production" was the Borah amendment which exempted from the maximum hour provisions of the bill "employees employed in a plant located in dairy production areas * * *." This amendment was adopted without debate (81 Cong. Rec. 7947) but was stricken in the House (82 Cong. Rec. 1802–1803).

The other significant amendments are discussed in the text.

sociation in a telegram read on the floor by Senator Copeland of New York; the proposed amendment would have changed the bill's definition of agriculture to cover work in connection with packing, storing, transporting and marketing fresh fruits and vegetables in their raw or natural state "within the area of production" (81 Cong. Rec. 7656). Senator Copeland explained (*ibid.*):

> The amendment would then make paragraph 7 [containing the definition of agriculture] the same in principle as recognized by N. R. A. and A. A. A. and under which the fresh fruit and vegetable industry operated. * * * There is a well-established precedent for this under the carefully considered position taken by the N. R. A. and A. A. A.

The proposed amendment was not adopted at that time but shortly thereafter Senator Schwellenbach proposed, and the Senate adopted, a similar amendment containing the phrase "area of production." It added to the definition of agricultural workers the following paragraph (81 Cong. Rec. 7876):

> The term "person employed in agriculture," as used in this act, insofar as it shall refer to fresh fruits or vegetables, shall include persons employed within the area of production engaged in preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state.

Contrary to one view taken under the N. R. A. and to opinions later expressed in the House, Senator Schwellenbach stated, in answer to a question, that a large packing plant in apple territory would be exempt under his amendment. This explanation, however, is not entitled to very great weight in considering Section 13 (a) (10) since at that time the amendment was limited to "fresh fruits and vegetables in their raw or natural state" and the Senator expected the limitation to deprive "any large or enormous plants" of the exemption. 81 Cong. Rec. 7876–7877.

Unfortunately, the term "employed within the area of production" did not have any such "established" meaning as Senator Copeland believed. The term "area of production" was used under the N. R. A. in a definition of agricultural labor drawn up by Dr. Leo Wolman, Chairman of the N. R. A. Labor Advisory Board, and agreed to by the officials of N. R. A. and A. A. A. The definition was prepared in an effort to settle a controversy as to whether laborers in citrus fruit packing plants were agricultural workers and thus not subject to labor codes under N. I. R. A.* The definition provided (N. R. A. Release No. 401, August 19, 1933, quoted in *Work Materials,*

* See letter of C. O. Miles of the National Citrus Committee to N. R. A. dated January 8, 1935; Borden, *History of the Labor Provisions, Code of Fair Competition for the Fresh Fruit and Vegetable Distributive Industry*, Part 2, Exhibit A, N. R. A. Files.

No. 45, Part A, National Recovery Administration Division of Review, March 1936, p. 17):

> Agricultural workers are all those employed by farmers on the farm when they are engaged in growing and preparing for sale the products of the soil and/or livestock; also, all labor used in growing and preparing perishable agricultural commodities for market in original perishable fresh form. When workers are employed in processing farm products or preparing them for market, *beyond the stage customarily performed within the area of production,* such workers are not to be deemed agricultural workers. [Emphasis supplied.]

This definition did not end the citrus dispute because the vagueness of the term "area of production" left it open to the operators to contend that since their plants were customarily located in the citrus growing regions, their employees were agricultural workers and therefore exempt. But although there was never agreement as to which application of the definition was correct, it is significant that subsequently an interdepartmental committee representing the N. R. A., the Department of Labor, the Department of Agriculture and the National Labor Relations Board found that citrus fruit packing house employees were "distinctly industrial labor."[7] This committee, it is true, was not confined to applying the

[7] *Work Materials, op. cit., supra,* Appendix B.

Wolman definition, but the decision is nevertheless significant because the purpose of the term "within the area of production" as used in the N. R. A. definition and in the Fair Labor Standards Act was to aid in distinguishing between farm and industrial labor.

The Wolman definition was a source of endless controversy between N. R. A. and A. A. A. and evidently became the subject of considerable attention.[8] In the dispute the A. A. A. took the position which respondent is urging; the N. R. A. denied it. It is enough to give one example. A. A. A. espoused the view that the definition covered employees in large packing or storage establishments because they were located in farming regions.[9] N. R. A. urged the opposite result; its official historian of the refrigerated warehousing code recorded in 1936 (Chastka, *loc. cit. supra*, p. 15):

> It is hardly conceivable that the last sentence of the above definition [Wolman definition] could be construed as meaning a refrigerated warehouse whose employees are strictly industrial as being within the "area of production," since this would mean intolerable confusion from the labor standpoint. * * *

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[8] *Id.*, Part A at 1, 18, 19, 21; History of the Labor Provisions, etc., *cit. supra*, n. 6, pp. 4, 106, 108, Part II, Exhibit G.

[9] History of the Labor Provisions, etc., *cit. supra*, n. 6, p. 106.

> The fact that a warehouse is constructed for the purpose of preserving perishable commodities by artificial cooling and the fact that the growers bring these commodities to the refrigerated warehouse for preservation should necessarily mean that this fruit has been removed from the area of production and such labor as is required after the commodity has reached the warehouse should not be agricultural.

When the codes were invalidated, the dispute had not been resolved.

The controversy concerning the Wolman definition must have been known to many Senators. Consequently, in spite of Senator Copeland's statement and Senator Schwellenbach's interpretation, a number of them must have realized that since N. R. A. had sought to give a meaning to "area of production" which excluded the large industrial establishments, the term would be open to that interpretation under the Fair Labor Standards Act. This is highly important. We do not contend that "area of production" was used in Section 13 (a) (10) in the sense in which N. R. A. interpreted it. We urge only that the Senate probably knew that the N. R. A. and A. A. A. had given the phrase different meanings and (as we shall show) that both the Senate and the House certainly recognized that the phrase was open to these different interpretations. This is enough to sustain the Administrator's current definition

for it demonstrates that when Congress subsequently inserted words giving the Administrator power to define "the area of production," it intended him to choose among conflicting views.

It is also significant that under N. R. A. and in the Schwellenbach amendment, the term "area of production" was used in connection with packing and storing to separate farm from industrial labor. The fundamental task assigned to the Administrator was to make this differentiation and the use of nongeographical criteria so plainly might be necessary in performing the duty that the power to consider them must be implied.

When the Senate bill was first reported by the House Committee on Labor, the provisions of the Schwellenbach amendment to the definition of agriculture were retained. H. Rept. 1452, 75th Cong., 1st sess. On the floor, however, the Lucas amendment was adopted broadening the definition to make it applicable to all "agricultural commodities" instead of "fresh fruits and vegetables" alone (82 Cong. Rec. 1783–1784).[10] The debate at

[10] As amended the definition read:

"The term 'person employed in agriculture' as used in this Act shall include persons employed within the area of production engaged in preparing, packing or storing agricultural commodities in their raw or natural state and shall include persons employed by any cooperative association as defined in Section 15, as amended, of the Agricultural Marketing Act, if such cooperative association is engaged in preparing, packing, or storing agricultural commodities in their raw or natural state."

that time throws little meaning on "area of production" except that it did not include urban centers (82 Cong. Rec. 1783–1784). Upon recommitment to the Committee on Labor the definition was narrowed somewhat. The bill reported on April 21 provided in Section 3 (g) (H. Rept. 2182, 75th Cong., 1st sess.):

> "Employee employed in agriculture" includes individuals employed within the area of production engaged in storing for the farmer, preparing (but not commercial processing), or packing agricultural or horticultural commodities in their raw, natural, or dried state, but does not include employees of transportation contractors engaged in transportation of farm products from farm to market.

On May 23 and 24, 1938, Congressman Biermann proposed an amendment to Section 3 (g) which read (83 Cong. Rec. 7401):

> "Employees engaged in agriculture" includes individuals employed within the area of production engaged in the handling, packing, storing, ginning, compressing, pasteurizing, drying, or canning of farm products and in making cheese and butter.

This amendment was adopted by the House (83 Cong. Rec. 7407–7408) and in conference became the basis for Section 13 (a) (10) of the Act. In considering its history, therefore, we are considering the history of Section 13 (a) (10).

The debate in the House on the Biermann amendment reflects the same two significant facts concerning the use of the term "area of production" that we have pointed out in connection with the Senate discussions of the Schwellenbach amendment. The first is that the term was used for distinguishing between agricultural workers and industrial employees. This had been made clear in the Senate by the reference to the N. R. A. precedent, and by a statement of Senator Schwellenbach in which he said (81 Cong. Rec. 7876):

> So far as I am concerned, I think there should be a regulation of hours and wages for all workers in the country; but the bill does not attempt to do that. The bill attempts to exempt agricultural workers. The situation in which I am principally interested * * * is one in which, unless an exemption of this kind is made, there will be a discrimination against the small producer and in favor of the larger producer. * * * It is not possible on the small ranch to supply the space for packing the apples. Therefore it is necessary for such a farmer either to join other farmers in a cooperative, or to send his apples to a packing house, and have these operations, which are purely agricultural operations, performed elsewhere than at the situs of the ranch or the farm.

In the House also the phrase "employed within the area of production" was used in distinguishing

between farm and industrial labor. It was inserted into the definition of agricultural employees. The statements of its sponsors show that they were concerned with exempting agricultural labor (83 Cong. Rec. 7401):

> Mr. WHITTINGTON. * * * As I understand the gentleman's amendment, it is merely a clarification of the definition of the word "employee" under the terms of the Act?
>
> Mr. BIERMANN. And it is the kind of clarification the farm organizations want. The question to be decided in voting on this amendment is whether or not the farmers of the United States are going to have *their definition of "employee" as applied to agriculture* or whether it is going to be written by people who have a city viewpoint. I do not find fault with the Committee on Labor, but I think whereas they are the experts who have knowledge regarding big factories in Jersey City, New York City, and some of the other large cities, by the same token we who come from the farm areas are best qualified to say what terms should apply to labor in those areas. [Emphasis supplied.]

The fact that employment within the area of production was consistently used or proposed as a test for separating agricultural from industrial workers strongly supports our conclusion as to the extent of the Administrator's power. It shows that basic problem underlying Section 13

(a) (10) was the necessity for making that differentiation. To do it fairly, without either injuring farmers or unnecessarily denying truly industrial workers protection against substandard wages, it would be proper to use other criteria than the location of the plants. The difference between agriculture and industry is not one of geography alone. Small packing sheds serving farms too small to have such facilities may be located in industrial regions. Large factories employing skilled laborers under industrial conditions may be located in producing territory. Indeed, in the N. R. A. Code for the Canning Industry (Code No. 446, Art. II, Sec. (1) (n)), employees in plants like respondent's were not regarded as agricultural workers and were entitled to the benefits of the labor provisions. The extent of the power to define which Section 13 (a) (10) vests in the Administrator must be determined in the light of the basic problem requiring his decision. So viewed, Section 13 (a) (10) cannot properly be said to confine the Administrator to questions of distance and region.

Second, the House debates clearly revealed an appreciation that the meaning of "area of production" was uncertain and would have to be worked out in the application of the Act. The declared purposes were not to increase the cost to the farmer,[11] not to interfere with the hours and

[11] For example, Congressman Biermann explained: "* * * The amendment I have offered includes only the

wages of employees in "little farm factories",[12] and to exempt employees in rural areas not working under truly industrial conditions;[13] but beyond that the sponsors of the amendment planned to leave to the processes of administration the problem of drawing the line between agricultural and industrial labor to achieve these purposes. Congressman Biermann who sponsored the amendment and whose words are therefore entitled to particular weight[13a] explicitly stated that the specific question here raised—whether the exemption applies to employees in a large factory located in the region in which its supply of farm products

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first processing of things that come off the farm. The important point is that the farmer pays the bill for this processing. Those of us who come from dairy sections know that the cost of making butterfat into butter or milk into cheese is borne by the farmer. There is no contention about that, no argument. The Members from the South will agree that the man who raises the cotton pays for ginning the cotton. When the cost of making butter, when the cost of making cheese, when the cost of ginning cotton increases the farmer gets just so much less; and our contention and the contention of the farm organizations is that this bill designed to help labor should not be so worded that it puts another burden on the agriculture of this country."

[12] E. g. "* * * We should not disrupt these *little businesses*, which are handling farm products directly from the farm and which are supplying good jobs to satisfied employees. * * * The bill is framed with big factory conditions in mind. Why include *little farm factories* where labor conditions are good? * * *" (83 Cong. Rec. 7326; italics supplied).

[13] E. g. 83 Cong. Rec. 7326, 7401, 7405.

[13a] *Richbourg Motor Co.* v. *United States*, 281 U. S. 528, 536; *Wright* v. *Vinton Branch*, 300 U. S. 440, 463–464.

is grown—would have to be determined in the administration of the Act. The following colloquy occurred on the floor (83 Cong. Rec. 7401–7402):

> Mr. THOMPSON. May I ask the gentleman from Iowa whether his amendment would apply to a packing house located in Iowa and Illinois in the area of production which employs two or three hundred men?
>
> Mr. BIERMANN. Speaking frankly, I think that is something that would have to be worked out.[14]
>
> * * * * *
>
> Mr. CRAWFORD. Does the gentleman's amendment exempt manufacturers of sugar beets in the rural areas?

[14] Later Congressman Thompson announced that he would vote against the proposal—presumably either because at that time no provision for working out the problem had been made or else because he feared it would not be worked out satisfactorily (83 Cong. Rec. 7406). Similar concern had been expressed by a number of Senators in discussing the Schwellenbach proposal. See, for example, Senator Reynolds' comments (81 Cong. Rec., July 30, 1937, at 7877; and comments of Senator Connally (*ibid.*).

In respondent's brief in opposition to certiorari (pp. 24–25), it is contended that significance should be attached to the congressional rejection of two amendments offered by Senator Reynolds making the whole Act inapplicable to employers having ten or less, or five or less, employees, respectively (81 Cong. Rec., July 30, 1937, at 7887–7888; 81 Cong. Rec., July 31, 1937, at 7948). These rejected amendments, however, proposed a flat exemption for *all* employers with less than the prescribed number of employees, and were not related to the "area of production" problem.

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Mr. BIERMANN. That is something that *the Secretary* will have to determine. [Emphasis supplied.]

When the bill went to Conference, the Biermann amendment was removed from the definition of agriculture and made the basis of the exemption now contained in Section 13 (a) (10). It was changed in two respects. The first change is unimportant here; it added to the "handling, packing," *et cetera* the words "preparing in their raw or natural state" and to "in making cheese and butter" the words "or other dairy products." The second change is of decisive importance in the instant case; the Conference Committee inserted after the vague words "employed within the area of production," the phrase "as defined by the Administrator." The change was accepted by both Houses when the bill was passed. We submit that this insertion shows beyond doubt that Congress intended the Administrator to have power to answer the question which Congressman Biermann said would have "to be worked out."

Taken as a whole the history of "area of production" shows that Congress intended to delegate to the Administrator not only a broad power to give the general phrase meaning by applying it to concrete facts but also the specific power to decide in the light of the purposes and policies of the Act whether to exempt establishments which are located in farming areas but which are essentially industrial because of their size or position in

the trade. Under the N. R. A. the meaning of "employed within the area of production" was a constant source of dispute and under one interpretation employees in large plants were regarded as outside that sphere regardless of their physical location. Although there is no evidence, it seems likely that many Senators must have known this history when they voted on the Schwellenbach amendment. In the House, the vagueness of the term was pointed out and the sponsor of the amendment containing it expressly stated that whether it applied to large establishments would have to be "worked out." Thereupon, the Conference Committee gave the Administrator power to define the "area of production." The only conclusion consistent with these facts would seem to be that Congress intended him to answer the unresolved questions by his definitions.

3. *The impossibility of drawing a purely geographical demarcation of the "area of production" without causing economic dislocations and unfair competitive conditions shows that Congress cannot have intended to confine the Administrator's authority to define to a power to demarcate geographical regions.*

It is only reasonable to assume that discretion delegated to the Administrator to define "the area of production" is to be exercised in the light of the policy of the statute as a whole, and particularly in the light of the basic policies enunciated in Section 2. Section 2 (a) shows that perhaps the most important single objective of the

Act was to eliminate unfair competition based upon payment of subminimum wages. As this Court pointed out in the *American Trucking Associations* case, "Upon the proper adjustment of these factors [employees' qualifications and working standards] within an industry and in relation to competitive activities may well depend the economic success of the enterprises affected * * *." 310 U. S. at 542. Section 8 shows that Congress was fully aware of the necessity of taking into account "economic and competitive conditions," of avoiding substantial curtailment of employment, and of "competitive conditions as affected by transportation, living, and production costs." See *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126. Surely the Administrator was not expected to adopt a definition of "area of production" without regard to these factors simply because Congress did not give an "itemized catalogue" in Section 13 (a) (10) itself. Cf. *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 219. When Section 13 (a) (10) is considered in its context in the statute, it is plain that an Administrator would be derelict in his duty if he undertook to define "area of production" heedless of the economic dislocations and unfair competitive conditions that an ill-conceived definition might foster.

But if Congress intended the Administrator to avoid economic dislocations and unfair competi-

tive conditions, it must also have intended to give him power to frame his definition in appropriate terms. Hence, in determining whether Congress intended by the words "area of production" to limit the Administrator under Section 13 (a) (10) to geographical definitions, it is material to inquire whether such definitions would accomplish the complicated task.

The record on which the Administrator's current definition was made establishes beyond doubt that no purely geographical definition could be conformed to the legislative policies at stake. For Congress to have limited the Administrator to mapping regional lines or fixing distances that commodities might move before they would be deemed to have left the area of production, would have been to render it impossible to avoid unwarranted disturbance of competitive conditions and resulting hardship to part of the trade. We shall point out immediately below the evidence proving this to be true, for although Congress of course was not fully familiar with the details of the conditions revealed in the evidence before the Administrator, it may be assumed to have had a general understanding of them. It follows that Section 13 (a) (10) cannot have been intended to confine the Administrator's discretion within such narrow limits as the court below held, but should be construed to allow him to establish additional criteria such as that of the size, and therefore of

the character, of establishments whose employees should be exempt.

Mapping geographical areas.—One approach to a definition of "area of production" based on purely geographic concepts is to map out for each commodity the areas in which the commodities are produced. The test seems simple and obvious because it is our habit to speak of the corn belt, the cotton belt, the apple States, the citrus areas, *et cetera*. Actually, the apparent simplicity is deceptive. There are more than 300 different "agricultural or horticultural commodities" grown in all parts of the country,[15] with no generally accepted concept of what constitutes "the area of production" for any one of the commodities. The production of most of them is widely dispersed. Some parts of the country specialize in particular kinds of commodities, while in other parts of the country diversified farming is practiced. Some commodities, such as poultry, eggs, milk, and many varieties of vegetables, for example, are produced in virtually every county in the country, as shown on the maps printed as Appendix IV. Their production is often most concentrated in industrial regions. In short,

[15] The United States Census lists more than 300 different agricultural and horticultural commodities which are produced in the United States. Farm and Ranch Schedules, U. S. Census of Agriculture, taken by the Bureau of Census, U. S. Department of Commerce, *Sixteenth Census of the United States:* 1940.

agricultural producing regions are not clearly segregated or delineated.[16]

As a result, the territorial definition of producing areas would wholly fail to achieve the objectives sought by Congress, even if it were possible to map them.[17] If one turns to the map on eggs, for example, one notes that the heaviest areas of egg production are located in metropolitan regions such as Boston, Philadelphia, Los Angeles, Buffalo, Seattle, and numerous other cities. One could hardly map out the producing areas of eggs without including most if not all of these large cities in which are located many industrial establishments that Congress clearly did not intend to exempt. At the same time, a mapping of the concentrated areas of production would deny the exemption to many small rural establishments in areas in which diversified agriculture is practiced, or in which the production of certain commodities is not concentrated, as throughout the South, for example, to continue the egg illustration. One would thus be faced with the anomaly of exempting large, urban, industrialized establishments and denying the exemption to many small rural establishments.

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[16] And after the 1940 hearings the Presiding Officer found "That large quantities of fresh fruits and vegetables are packed or canned in regions or localities which are not defined or definable as producing areas." (Release G–60, p. 12.)

[17] See also pp. 49–51, *infra*, where the administrative complexities are discussed.

If, on the other hand, the mapping program were extended to include the areas of relatively scattered production, it would, in effect, exempt all the establishments in the industry.

Reference to the maps contained in the appendix makes it perfectly evident that this dilemma involved in the mapping approach is involved in practically all commodities. The mapping approach is thus thoroughly unsound from both a substantive as well as an administrative standpoint.

Flat mileage basis.—Under this test, an establishment would be within the "area of production" if all the commodities that it handled were produced within a specified distance from the establishment. The criterion has the apparent advantage of definiteness and certainty and, when used in conjunction with a population test to insure that the operation does not take place in a metropolitan area, was believed at one time to effectuate the general congressional purposes in most cases (see pp. 69–72, *infra*). Such a definition actually issued and was applicable during part of the period involved in the instant case but it was subsequently abandoned because of the serious unfair discrimination it was found to have caused in many cases between firms outside the area and their competitors within it.

The discrimination created by any mileage definition gives indefensible competitive advantages to some firms at the expense of others not so fortu-

nately situated."[18] Moreover, one consequence of such discrimination is the strong stimulus to readjust sources of supply in order to be eligible for the exemption, with the result, in many cases, that farmers may be denied normal outlets for their products, and the orderly and fair marketing of goods in commerce may be interfered with and

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[18] The Presiding Officer found that "much evidence was offered to show, and it clearly established, that the 'area of production' as defined in this section, results in competitive discrimination in favor of those employers within and against those outside the 'area of production' as defined. This evidence was consistently repeated at each hearing and by practically all witnesses who appeared in behalf of operators in all localities" (Release G–60, p. 2). He also found: "That many plants which normally obtain fresh fruits and vegetables from distances greater than ten miles are entirely comparable to and competitive with plants that fall within the ten-mile limitation in the present definition; and that any mileage limitation, except one so large as to exempt all plants no matter what the source of their raw materials, would necessarily create a similar discriminatory situation" (Release G–60, p. 12).

R. G. Phillips, representing the International Apple Association, National League of Fresh Fruit and Vegetable Distributors, and United Fresh Fruit and Vegetable Association, stated that "establishing an area of production based on the number of miles from the packing and storage plants would be improper, illogical, unnecessary, and would not meet conditions and developments that actually existed * * *" (Supplemental Brief, Jan. 26, 1939, p. 17).

C. B. Moore, representing the Western Growers Protective Association, "the largest unit group of any perishable producing group in the country" (Hearings Jan. 9–12, 1939, reference no. 54, p. 88), asserted that "you cannot limit it [producing territory] by miles in the industry that I represent" (*id.*, pp. 125, 126).

disrupted (see Section 2 (a) of the Act). A flat mileage test alone would have the additional fault that it would permit the exemption in the case of big establishments located in large cities; in many cases, such establishments draw their supplies from distances no greater than establishments in rural areas.

The "general vicinity" test now in effect is a more flexible concept in that it takes into account the various topographical features in different regions and the varying distances encountered in marketing the variety of products covered by the exemption. However, standing alone it would have many of the serious defects of the flat mileage or mapped region definitions.

In discussing the legislative history of Section 13 (a) (10) we pointed out that "within the area of production" had previously been used under N. R. A. in distinguishing farm from industrial labor and that Congress, conscious of the N. R. A. background, used the term for that purpose in Section 13 (a) (10). Accordingly, it is a fair inference that Congress intended the Administrator in defining "the area of production" to bear in mind that the purpose of his definition is to differentiate agricultural workers from industrial employees entitled to the protection of the Act. (See pp. 16–27, *supra*). The conditions which make it impossible to use the two purely geographical tests without producing economic disturbances and unfairness that Congress wished

to avoid, also make it impossible to separate farm employees from industrial laborers on the basis of location or mileage and population alone. Many small packing sheds serving a few nearby farms that lack such facilities are located in urban centers outside the regions of concentrated production. Large factories are often located in small towns in farming regions; they use highly mechanized equipment operated by hundreds of skilled factory laborers who work and live under industrial and not farm conditions. Indeed, it is not too much to say that within the area affected it would frustrate all the purposes of the Act to construe Section 13 (a) (10) to forbid the Administrator to supplement a space definition by other criteria, such as size, showing the economic and competitive position of the establishment and the industrial or agricultural character of the employment.

This does not mean that the Administrator is free to ignore geography and establish any tests he may choose. A chief connotation of "area of production" is region or distance and doubtless the Administrator should give effect to it, as he did in the definition currently in force. Our contention is simply that the words "employed within the area of production (as defined by the Administrator)" should not be interpreted to exclude from permissible definition the use of nongeographical criteria necessary to accomplish the purposes of the Act.

B. THE CURRENT DEFINITION WAS A REASONABLE CHOICE ADAPTED TO THE STATUTORY END

Once it is established that Section 13 (a) (10) does not arbitrarily confine the Administrator to geographical definitions, it follows without real doubt that the definition now in force is valid. The definition includes within the area of production those plants which are located within the general vicinity of the farms they serve except that it denies the exemption to plants employing more employees than seven because regardless of location they are industrial in character and compete with factories in urban areas. The procedure followed in promulgating the definition and the evidence on which it was based both demonstrate that the combined test of location and size is fair, reasonable, and adapted to the statutory ends.

1. *The proceedings leading to promulgation of the current definition.*

Although the Administrator did not hold hearings before promulgating the original definition,[20]

[20] Because of the shortness of time and his small staff, the Administrator was unable to hold hearings or to make an adequate investigation of the problem in the early months of the Act's operation. However, before the promulgation of the original definition, an economic study was made to investigate the practical effects of a variety of possible definitions and conferences were held with experts attached to the U. S. Department of Agriculture, and with representatives of labor and of a number of the affected industries. See Administrative Procedure in Government Agencies, Part I, pp. 67–68.

extensive hearings and thorough investigations were commenced about two months after the effective date of the Act and on several subsequent occasions. Special hearings were held for particular commodities or groups of commodities.[21] In some cases witnesses were heard and conferences were held in outlying regions easily accessible to certain groups in the industries concerned. Over 200 representatives appeared at the formal hearings, including more than 150 employer representatives, some 14 employee representatives, and a number of members of the Senate and House. Twenty-four volumes of evidence, containing more than 4,000 pages, were taken at the formal hearings alone. In addition, hundreds of exhibits were submitted. Special studies and reports bearing on various aspects of the problem were made by

[21] See Hearings on Proposed Amendment of Section 536.2 (area of production) of Regulations issued under the Fair Labor Standards Act of 1938, Wage and Hour Division, United States Department of Labor: on fresh fruits and vegetables, reference no. 54, Jan. 9–12, 1939 (4 vols.); no. 73, April 3–4, 1939 (2 vols.); no. 162a, May 1–4, 1940 (4 vols.); no. 162b, May 6–8, 1940 (3 vols.); no. 162c, May 9–11, 1940 (3 vols.); on dry edible beans, Nov. 14–15, 1938 (2 vols.); on tobacco, reference no. 48, Dec. 9–10, 1938 (2 vols.); on poultry, reference no. 58, Feb. 9, 1939 (1 vol.); on seed, reference no. 71, March 27, 1939 (1 vol.); on sugar, reference no. 72, March 29, 1939 (1 vol.). A copy of the transcripts of each of these hearings has been deposited with the Librarian of the Supreme Court Library.

economists and investigators of the Wage and Hour Division of the Department of Labor.[22]

A considerable portion of the hearings related specifically to the application of proposed definitions to the fresh fruits and vegetables industries, which included canning plants like the one involved in the instant case. The first group of these hearings was held on January 9–12, 1939, by a representative of the Administrator.[23] The Administrator, instead of accepting the findings and recommendations of this representative, personally held hearings on the same subject on April 3–4, 1939.[24] Following the latter hearing, the Administrator promulgated an amendment to the regulations setting up a special alternate definition applicable to operations on fresh fruits and vegetables (R. 188). On June 17, 1939, a further gen-

[22] Among these studies and reports were the following: *Report on Proposal to Broaden Wage and Hour Exemptions under the Fair Labor Standards Act by Removing the "Area of Production" Limitation in Section 13 (a) (10)*, March 1940; *Report on the Citrus Fruit Packing Industry under the Fair Labor Standards Act*, April 1940; *Report on the Fruit and Vegetable Canning Industry under the Fair Labor Standards Act*, May 1940; *Tables Relating to the Fresh Fruit and Vegetable Packing Industry in Selected States and for Selected Products*, May 1940. Copies of these studies and reports have been deposited in the Supreme Court Library.

[23] The hearing officer's findings were published by the Division as Press Release R–226, which has been filed with the Librarian.

[24] Reference No. 73, see footnote 21, *supra*.

eral amendment to the regulations became effective (R. 188–189). Following these amendments protests continued in large volume and the United Fresh Fruit and Vegetable Association of Chicago and sundry other parties petitioned for re-examination and amendment of the definition (see Release G–60, p. 1).

Another group of hearings was held in 1940. In the latter part of March and early April, twelve regional hearings were conducted in various sections of Florida, Arkansas, Texas, and on the Pacific coast by regional representatives of the Division, with a view to obtaining data to be used in connection with the national hearings. A series of national hearings was then commenced at Washington. From May 1 to 4, a hearing on the handling, packing, storing, preparing in their raw or natural state (but not canning) of citrus fruits was held. From May 6 through 8, a similar hearing was held with respect to operations on all fresh fruits and vegetables other than citrus. From May 9 through 11, a hearing was held with respect to the drying and canning of fresh fruits and vegetables, including citrus.

By the time these hearings were commenced, the complexity of the problem and the need for careful balancing of conflicting interests had been demonstrated by experience. To insure a fair consideration of all pertinent factors, the presiding officer announced in a press release (Release R–716)

that evidence would be received on all relevant factors, including the following:

(1) Percentage of plants, employees, and of industry pack now exempt from the Act.

(2) Characteristics of the exempt plant as distinguished from the nonexempt plant, i. e., size, location, distance from within which commodities are obtained from farms, and hourly earnings of employees.

(3) Competition between regions and between the exempt and nonexempt plants locally and on national markets.

(4) Ratio of labor costs to total operating costs in both exempt and nonexempt plants.

(5) Changes in costs as a result of the Fair Labor Standards Act and effect of changes in costs on (a) farmers' prices, (b) prices to consumers, (c) consumption of products, and (d) productivity of labor.

(6) Availability of markets to farmers.

(7) Number of workweeks of more than 44, 42, and 40 hours worked during the past three seasons by exempt and nonexempt plants.

(8) Fluctuations in number of employees and volume of fruits handled from week to week during the past three seasons.

(9) Types of occupational skills required in, and available supply of labor for, both exempt and nonexempt plants.[25]

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[25] The evidence received at these hearings was summarized by the presiding officer in Press Release G–60. Copies of this Release have been deposited in the Supreme Court Library.

It was brought out at the hearings that not only are the packers and canners of the same commodities in competition with each other, but that their products are highly competitive with other canned fruits and vegetables and with fresh, frozen and dried produce.[28] Plants of the same

[28] See, for example, the following pages of the transcript of the Hearings of May 9–11, reference no. 162c, pp. 63, 64, 304–305, 311, 375, 417.

J. A. Burch, representing the South Texas Canners Association, stated: "On citrus products, 50 percent of our production will be marketed in the Atlantic Seaboard states, approximately 35 percent in the Middle West, approximately 10 percent in the Southwest, and approximately 5 percent on the Pacific Coast. There are, of course, some small distributions in all other sections. These citrus products are sold on all markets in which these citrus products are sold, in competition with those from Florida, California, and some from Arizona.

"Our canned vegetables are distributed generally in the southwest territory, which includes the states of Louisiana, Arkansas, Missouri, Oklahoma, Colorado, New Mexico, and Texas, but predominantly in the state of Texas. Canned vegetable products encounter competition from practically all over the United States, in all territories to which they are shipped." (Hearings of May 9–11, 1940, Exhibit S–4, p. 7.)

Stuart Farrar, of the New York State Canners Association, summarized the situation as follows: "In speaking of competition in the canning industry here, I have gathered from previous testimony that they were talking more or less of competition among the canners. We feel in New York State that this competition is from all types of food, one competes with another, regardless of whether it is green produce, frozen produce, or dried produce. Consequently any catastrophe which affects one phase of the industry affects all phases. A freeze in Florida has a definite effect on

size, handling the same types of commodities and subject to substantially the same costs, may be located either in small towns or in comparatively large towns or cities."[27]

A basic consideration in drafting a workable definition, as was generally conceded by industry, labor, and public representatives at the administrative hearings, was the importance of keeping competitive inequalities at a minimum.[28] Also an

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the canned goods packed in Maine or New York State. Consequently any artificial influence which is established affects the canner and also the green produce man." (Hearings of May 9–11, 1940, reference no. 162c, pp. 325, 326.)

[27] "* * * competition between the city canner and the country canner is so close that if under the Fair Labor Standards Act the country canner were granted exemptions which were denied to his city competitor, it would result in virtual discrimination against the canner in the large city." (C. B. Torsch, representing the Baltimore Canned Foods Exchange, Hearings Jan 9–12, 1939, reference no. 54, p. 891.)

"The size of the community in terms of the population is equally inapplicable because the application of such test would inevitably tend to discriminate against plants in the same type and size located in differing surroundings." (Boris Shishkin, Economist for the American Federation of Labor, Hearings Jan 9–12, 1939, reference no. 54, p. 973.)

[28] The solution proposed by the employer representatives, not unnaturally, was to exempt the specified operations in whole industries, whole States, and even the whole United States. See, for example, in the January 1939 hearings (reference No. 54), pp. 69–70, 177–178, 189–190, 283–284, 427–428, 707, 886. The California Farm Bureau Federation proposed the following definition: "An individual shall be regarded as employed in the area of production within the meaning of Section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in the raw or natural state or canning of agricultural or

ill-conceived discriminatory definition might seriously restrict the grower's market in some localities and thus cause economic dislocation for

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horticultural commodities for market, or in making cheese or butter or other dairy products, (a) if he performs those operations on materials, all of which come from the farms, and (b) if he performs those operations on materials in any of the processes which prepare them for market, distribution or for re-manufacture." (Letter, June 20, 1940, docket 51, case 2.).

Not only is this definition so broad as to exempt all employees engaged in any of the specified operations, but the last part of the definition would exempt considerably more operations than those enumerated in Section 13 (a) (10), since it exempts not only operations "for market" but also those for distribution or remanufacture.

The court below, also, seems to suggest that the only permissible definition is one which would give a blanket exemption to the specified operations (R. 228), although it found it unnecessary to determine the question since it believed, contrary to the District Court's finding (R. 192), that the respondent met the "general vicinity" test. Concurring, Judge Waller stated frankly his opinion that the area of production could mean only "the area within which such fruits and vegetables are customarily, in the usual course of business, brought by the farmer to be marketed or processed," "without regard to the number of employees, without regard to the location of a city, and without regard to any [other] factor" (R. 230). This, of course, would give a blanket exemption to all plants performing the operations enumerated in Section 13 (a) (10).

Employee representatives, on the other hand, urged that the definition be narrowly construed and that large industrial plants not be freed of the requirements of the Act. Cf. Hearings January 9–12, 1939, reference no. 54, p. 973; Hearings May 1–4, 1940, reference no. 162a, p. 522; Hearings May 9–11, 1940, reference no. 162c, p. 390.

farmers as well as for canners and packers.[29] Any reasonable and practicable definition of "area of production" had to be drawn in the light of a careful study and understanding of this background.

On the basis of the hearings and investigations, the Administrator's original definition has been revised a number of times. Since the promulgation of the original definition on October 20, 1938,[30] two basic revisions have been made.[31] Experience or changing conditions may require further amendments in the future, for which appropriate provision is made in the Administrator's regulations.[32] The definition here challenged rep-

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[29] See, for example, Hearings April 3–4, 1939; reference no. 73, p. 112; Hearings May 6–8, 1940, reference no. 162b, p. 160; Hearings May 9–11, 1940, reference no. 162c, pp. 37, 55, 167, 213, 319.

On the basis of the evidence Presiding Officer Vincent found that "the testimony also indicated that the mileage limitation in the present definition has the effect of limiting the market outlet for the products of some growers who deal or wish to deal with plants located within and outside the 'area.'" (Release G–60, p. 2.)

[30] 3 F. R. 2536 (October 22, 1938).

[31] 4 F. R. 2436 (June 17, 1939) and 6 F. R. 1476 (March 18, 1941). In addition, special definitions relating to particular industries have been promulgated from time to time. 3 F. R. 3072 (December 22, 1938); 4 F. R. 1009 (February 25, 1939); 4 F. R. 1655 (April 20, 1939); 4 F. R. 2436 (June 17, 1939); 5 F. R. 2647 (July 24, 1940); 6 F. R. 5165 (October 11, 1941). The various definitions are printed in Appendix I.

[32] Section 536.3 of the Regulations provides: "Any interested person or association wishing a revision of the forego-

resents an attempt by the Administrator to solve the problem without economic dislocations by striking a balance between the narrow objective of the Section 13 (a) (10) exemption and the broad policies of the Act as expressed in Section 2. Cf. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 581, 583–584.

2. *The evidence at the hearings shows the current definition to be reasonable.*

In the course of these proceedings many kinds of definitions were proposed, considered, and eliminated as unfair or impracticable or contrary to the policies of the Act. One possibility, already discussed, was the mapping of producing territories. It was rejected for the reasons stated above (see pp. 33–36, *supra*). Moreover, it was unworkable administratively. The enormous administrative burden involved can best be appreciated by reference to the maps in Appendix III, showing the producing regions of a few commodities. To cite

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ing regulations may submit in writing to the Administrator a petition for amendment thereof, setting forth the changes desired and the reasons for proposing them. If upon inspection of the petition the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to interested parties or will make other provision for affording interested parties an opportunity to present their views either in support of or in opposition to the proposed changes." (Section 536.3, as amended, approved by the Administrator March 12, 1941; effective April 1, 1941; published in the Federal Register March 18, 1941.)

a single illustration, the egg map shows a very heavy concentration of production beginning in New Hampshire and extending through lower New England, New York, and New Jersey and then swinging through Pennsylvania and across the continent into Iowa and Minnesota, ending in Nebraska and the corner of South Dakota. Additional heavy concentrations are found in California, Oregon, and Washington. The map shows, however, that eggs are produced without exception in every State of the Union. It would be relatively easy, of course, to draw a line around the entire United States and to say that the entire United States is the "area of production" of eggs and do likewise for each of the hundreds of commodities which are referred to by the Section 13 (a) (10) exemption. Such a mapping, however, would make a mockery of the limitation placed by the Congress on the exemption and must be rejected for that reason. The alternative would be to draw maps around many individual producing areas, but it would be an enormous task to determine precisely where each such producing area began and ended. Yet, in order to achieve the necessary definiteness to make the exemption administrable, it would be necessary to draw precise and definite lines around all producing areas in the country. The enormous amount of research involved and the difficulties involved because of the lack of clear segregation between producing

areas are evident even for a single commodity.[33] When it is considered that this task would have to be completed for hundreds of commodities, it can be readily appreciated that an exemption dependent upon the completion of this task would involve years of effort.

A second test proposed was to define the area of production to include all plants drawing farm products from within a definite radius except those located in urban centers. This is the flat mileage-population definition which was in effect for several years. It proved unwarranted for reasons already stated (see pp. 36–38, *supra*). After the hearings the Presiding Officer found that "much evidence was offered to show, and it clearly established, that the 'area of production' as defined in this section, results in competitive discrimination in favor of those employers within and against those outside the 'area of production' as defined. This evidence was consistently repeated at each hearing and by practically all witnesses who appeared in behalf of operators in all localities" (Release G–60, p. 2). See also notes, 18, 27, *supra*.

Another possibility was to consider as falling within the "area of production" plants which

[33] Even for such a relatively localized product as citrus fruit, mapping of the major producing regions in Florida, California, and Texas would exclude the minor areas in Arizona, Louisiana, and Mississippi, as shown in the map in Appendix IV.

were the first concentration points for commodities after leaving the farm. The studies made by the Division indicated that no definition of this character could be applied generally.[34] Some agricultural commodities, such as grains, beans, and milk typically are assembled and first processed in small rural establishments, and then sent to large urban establishments for further handling. Other commodities go direct to establishments ranging from small plants to large urban factories. At times, establishments receive all their commodities directly from farms, and at other times, even in the same season, they receive some or all of their commodities from other points at which they have been assembled.[35] There would, therefore, be consider-

[34] With respect to "dry edible beans" and "Puerto Rican leaf tobacco," this definition has been adopted (R. 190–191). Peculiar conditions, as well as established practices in these industries, made this feasible. Release R–201; Hearings November 14–15, 1938, on dry edible beans (2 vols.); December 9–10, 1938, on Puerto Rican leaf tobacco, reference No. 48 (2 vols.).

[35] In Florida, "the canneries get their supplies from both the groves which are throughout the areas and from the packing houses which are throughout the area" (Hearings January 9–12, 1939, reference no. 54, p. 839). In Texas, the citrus canners "at times buy fruit from the fresh fruit shippers, that is, the grades that are not used to go out in the fresh shipments" (*id.*, at 73). Canners in the Baltimore area draw their raw materials from "commission merchants in the City of Baltimore acting as receivers of the products of growers" as well as from growers (*id.*, at 884). Citrus canneries in California typically "receive the *hulls* [evidently culls] or by-product oranges from the packing house" (*id.*, at 933).

able administrative difficulty in determining whether an employer's establishment is a first concentration point.

Moreover, while this definition does not produce substantial competitive inequalities with respect to the specific commodities for which it has been adopted, if applied generally to the operations described in Section 13 (a) (10) it would be severely discriminatory. Furthermore, the adoption of a first concentration point definition for the canning of these products would probably result in substantial waste of packing house culls which are suitable for canning. For, under such a definition, many canneries would refuse to buy packing house culls in order to secure an exempt status, with the result that substantial amounts of these culls would have to be thrown away. The farmer would be the loser in that he would receive from the packing house a smaller aggregate return for his produce.

Another alternative considered and rejected was to define "area of production" so as to include only establishments which handled and prepared commodities for the account of the farmer, the latter retaining title. Such a definition, however, would have no rational relationship to the purpose of the exemption. Whether commodities are handled on a fee basis for the account of the grower or otherwise depends more upon historical accidents in the local development of marketing methods than upon any other factor. Neither the size of an establish-

ment nor its nearness to sources of supply is correlated to the one practice or the other. Nor is it more likely that an establishment will pass its costs back to the farmer because it follows one practice rather than the other. Numerous industry representatives at the administrative hearings pointed out that a distinction on this basis would be unwarranted and complained that it would cause disrupting discrimination between different regions.[36]

The above discussion gives some idea of the difficulty of the problem of definition. Successive Administrators, after wrestling with the problem have each concluded that a definition expressed solely in geographical terms could not be adapted to the concrete practical needs of the industries involved. They also rejected the other alternatives. In an effort to make a geographical test workable,

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[36] This basis of definition was strongly opposed by E. G. Grimes, of the Florida Citrus Commission, a State regulatory body. He asserted, with respect to the packing of citrus (April 3, 1939, Hearing, reference no. 73, pp. 77, 78, 80), that Florida had about 40 percent of its fruit handled by cooperatives for the benefit of the grower, the other 60 percent being handled by "independents." In California, however, 95 percent of the fruit is packed by cooperatives, he said.

R. G. Phillips, representing the International Apple Association, National League of Wholesale Fresh Fruit and Vegetable Distributors, the United Fresh Fruit and Vegetable Distributors' Association, and several other associations, also strenuously opposed this definition as impracticable, stating it would create "terrific disruption, discrimination, and chaos in the whole market" (Hearing, April 3–4, 1939, reference no. 73, p. 226).

they have coupled a requirement that all commodities be received from the "general vicinity" or "immediate locality" with a coordinate requirement that the establishment shall not employ more than seven employees (R. 187–192). Such a combination affords a practical means of achieving a rough geographical limitation and, at the same time, reduces competitive discrimination to a minimum. Limiting the number of employees automatically confines the exemption geographically, because a small plant can absorb only a limited amount of agricultural commodities and its capacity is normally sufficient only for the products of nearby farms." Thus the limitation on the number of employees is not dissociated from, but rather helps to effectuate, the standard of nearness implicit in the phrase "area of production." Indeed, when the Court compares the great dis-

[37] "The number of employees per plant increased both as the maximum radius of operations of the plants increased and also as the size of the community increased." (*Report on the Fruit and Vegetable Canning Industry under the Fair Labor Standards Act*, May 1940, p. 8, W. H. Exhibit no. 15, Hearings May 9–11, 1940.)

"In general the smaller plants obtain their products from more restricted areas and also tend to be located more often in rural communities or the open country. For example, in Florida, on the basis of the industry questionnaire, 14.2 percent of the citrus packing plants would be exempt because of both being located in rural communities and obtaining all their products from within 10 miles. However, these plants had only 5.8 percent of the total number of employees included in the study." (*Report on the Citrus Fruit Packing Industry under the Fair Labor Standards Act*, April 1940, p. 56, W. H. Exhibit no. 10, May 1–4, 1940, Hearing.)

tances of the Western farmlands with those of the thickly settled Eastern agricultural areas, it seems plain that a limitation phrased in terms of the number of employees serves better than could any measure in terms of miles to extend the exemption to establishments serving the nearby farms and to no others.

The Administrator's definition setting up the "general vicinity-seven employee" standard results generally in little competitive dislocation. Many agricultural commodities are first handled in small establishments located close to the farm, with subsequent handling and preparation occurring in large establishments located in urban communities. Under this marketing system, the small and the large establishments are complementary and not competitive, and an exemption including such a limitation on the number of employees offers very litle interference to the competitive structure of the industry. In other cases, it is true, the initial preparation and handling of the same commodity may occur in plants which vary considerably with respect to the number of employees. But even in this situation there is not likely to be any substantial competitive discrimination. The large plants are normally highly capitalized, well equipped, and expertly managed. These establishments have competitive advantages to compensate for those which the exemption of Section 13 (a) (10) gives to the small plant located near the farm.

It was particularly evident with respect to the packing and canning of fresh fruits and vegetables, that the limitation of the exemption to the very small plants was entirely reasonable. Presiding Officer Vincent, after the May 1940 hearings, found that the competitive packing and canning plants for fresh fruits and vegetables were so distributed among rural regions and large and medium-sized cities, that a definition which made a distinction on the basis of geographical location alone, "would operate to seriously disturb established competitive conditions" and would cause "serious competitive discriminations" (Release G–60, finding 2, p. 12). He found further that, prior to the Act, the areas producing the major part of the volume of fresh fruits and vegetables paid wage rates higher than the minimum-wage rate under Section 6 (*id.*, finding 6, p. 12); and that to make the minimum wage exemption available to plants in the lower wage areas would only serve to exaggerate the wage advantage enjoyed in any event by the plants in the low-wage area.[38] He concluded that such a competitive advantage "*between* producing areas

[38] "* * * even though operators in low-wage areas were placed under the minimum wage set by the Act they would still enjoy a minimum wage advantage over operators in high-wage areas. This would result both because of the considerably higher wages now prevalent in the latter areas, and because a larger proportion of workers in these areas receive more than the 30-cent minimum than is the case in low-wage areas." (Release G–60, p. 9.)

is as prejudicial to fair commerce as discrimination *within* producing areas" (*ibid.*)." The presiding officer also found that the minimum-wage requirements of the Act placed no appreciable economic burden on plants packing and canning fresh fruits and vegetables or upon the farmers producing such commodities because "except for a relatively few areas which produce a minor part of the total volume of fresh fruits and vegetables, application of the minimum wage provided by Section 6 of the Act does not add to or increase the labor cost of packing and canning" such commodities (*id.*, finding 5). There was thus no serious claim that employees in these industries working in the plants not exempted by the Administrator's definition should be deprived of the minimum wage.

There was, however, considerable concern about the overtime requirements of the Act. Section 7 (c), which automatically granted an exemption

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" The presiding officer's findings summarize the testimony showing extensive competition between regions, pointing out that "Fruits and vegetables, both raw and canned, are sold on a national, and in many instances, an international market. This was testified to by operators in both high-wage areas and low-wage areas" (Release G–60, p. 8). South Texas canners "enter into competition with all other producing sections in the United States"; "the Lower Rio Grande Valley and Coastal Bend section are in direct competition with California and Florida producers"; Virginia potatoes and vegetables compete with products "from California to Maryland"; California citrus competes with Florida and Texas production (*id.*, pp. 8–9).

from the overtime requirements of 14 workweeks per year to the industries in question, was deemed insufficient to offset the increase in costs for overtime since the active seasons for fresh fruits and vegetable canning and packing in many instances exceed 14 weeks, "but rarely more than 27 or 28 weeks" (Release G–60, finding 7, p. 12). The presiding officer therefore concluded that this was a matter to be solved by application for a seasonal exemption from the overtime provisions only, pursuant to Section 7 (b) (3) of the Act, and that there was no practical need for a blanket exemption under Section 13 (a) (10) (*id.*, recommendation 3, p. 13). Accordingly, an additional 14 workweeks' exemption was made available to the fresh fruits and vegetable canning and packing industries by the Administrator's finding of seasonality effective August 24, 1940, and these industries now have approximately seven months' exemption from the overtime requirements.

Indicative of the reasonableness of the present definition is the great reduction in the number of complaints and petitions for redefinition since its effective date. Prior to its adoption, a great many complaints were made and petitions for redefinition were filed during a period of years. Since the effective date of the present definition only occasional complaints are received from isolated plants.

It is not unreasonable to make the application of the exemption depend upon a numerical limitation. Many analogies can be found in legislation where application of the statutory requirements depends upon a numerical or size limitation "apparently arbitrarily fixed." *Booth* v. *Indiana,* 237 U. S. 391, 397; *Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S. 495, 510; *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152. What is a reasonable basis for classification or definition of terms when legislative action is involved would appear to be equally reasonable where an administrative agency performs quasi-legislative functions under a proper delegation of authority. Cf. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 83; *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 185–186.

II

THE DECISION BELOW INVADES THE PROVINCE OF THE ADMINISTRATOR

This Court repeatedly has recognized that the scope of judicial review of administrative action must of necessity be narrowly confined especially "where the review is of regulations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged." *Security Administrator* v. *Quaker*

Oats Co., 318 U. S. 218, 228; *United States* v. *Bush & Co.*, 310 U. S. 371; *Railroad Commission* v. *Rowan & Nichols Oil Co., supra; National Broadcasting Co.* v. *United States*, 319 U. S. 190; *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176; *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479. And where, as in the instant case, no direct judicial review was provided by Congress, whatever judicial inquiry is made must be made with the greatest restraint. Cf. *Switchmen's Union of North America* v. *National Mediation Board*, No. 48, October Term, 1943, decided November 22, 1943; *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Rd. Co.*, No. 23, October Term, 1943, decided November 22, 1943; *Brotherhood of Locomotive Engineers* v. *Southern Pacific Co.*, Nos. 27 and 41, October Term, 1943, decided November 22, 1943."

[39] As in the case of the certification and designation provisions of the Railway Labor Act, there is no express provision in the Fair Labor Standards Act for judicial review of the Administrator's definition of "area of production." Nor is there any general provision for judicial review of his rule-making powers. On the other hand, Section 10 (a) of the Act expressly provides for judicial review of certain administrative wage orders. Hence, as in the *Switchmen's Union* and *Brotherhood of Locomotive Engineers* cases, *supra*, the inference is strong that other determinations delegated to the Administrator, for which no review was expressly provided, were intended to have "a finality which it [Congress] denied administrative action under the other sections [e. g. 10 (a)] of the Act." *Switchmen's Union* case, *supra*.

The court's inquiry is at an end if there is found a rational relation of the regulation to the statutory authority; the question is whether the particular alternative which the Administrator selected, among many alternatives, to achieve the objectives of the Act is one which, in the circumstances, a rational person could have chosen. Cf. *Final Report of the Attorney General's Committee on Administrative Procedure,* S. Doc. 8, 77th Cong., 1st Sess., pp. 116, 117, 119.

The court below, stating the principle that it "should not attempt either to legislate or to define the area of production" (R. 228), applied its interpretation of the portion of the Administrator's definition which it regarded as valid. But it is plain that in extending the exemption to respondent, the court in fact was applying its own definition. From the administrative hearings and findings, as well as from the terms of the various definitions adopted by the Administrator, it is clear that, had the Administrator considered the numerical limitation unauthorized, he "would not have been satisfied with what remains" (*Williams* v. *Standard Oil Co.,* 278 U. S. 235, 242; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 184), and would not have adopted "general vicinity" as the sole requirement of his definition. The "general vicinity" provision, standing alone, would have "an effect altogether different from that sought by the meas-

ure [the Administrator's definition] viewed as a whole" (*Railroad Retirement Board* v. *Alton R. R. Co.*, 295 U. S. 330, 362). That the Administrator would not have adopted a definition giving such breadth to the exemption is affirmatively evidenced by his rejection of alternative definitions.[40] The court below thus defeated the intent of the Administrator and in effect wrote its own definition.

Even if it be assumed that the Administrator's definition was invalid, we submit that it was error for the court below to extend to respondent an exemption on the basis of the court's own conception of a fair and reasonable definition (*Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 580–581). For this involved the exercise of a legislative function which Congress did not confer upon the courts (cf. *Switchmen's Union* case, *supra*), and which it is doubtful that Congress could have conferred on Federal courts. *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, 466; *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 444. Cf. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage*

[40] See pp. 49–54, *supra*, discussing consequences of alternative definitions. One o the definitions adopted b the Administrator but later abandoned because it was found unsatisfactory provided that an establishment was in the "area of production" if it received products from the immediate locality and was located in the open country or a rural community.

Co., 289 U. S. 266, 275–276. Moreover, for the courts to undertake to grant an exemption to establishments which have not met the requirements of the Administrator's definition is to invite widespread confusion. Varying judicial definitions in different sections of the country would result, causing indefensible discrimination between competitors. The judicial definitions would necessarily be based upon the records in single isolated cases without adequate consideration of the problem as a whole. In addition, employees and employers would not know, until they had litigated, whether they had any rights or liabilities under the Act. This is precisely the confused situation which follows from the decision of the court below.

We believe that, assuming the invalidity of the Administrator's definition, there are only two courses of judicial action available. One is to extend the exemption to everyone engaged in the operations enumerated in Section 13 (a) (10). Such an unlimited exemption, however, would plainly be at variance with the intent of Congress and with the well-established principle that the coverage of "remedial" legislation should be liberally construed and "exemptions from its sweep should be narrowed and limited to effect the remedy intended." *Piedmont & Northern Ry.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311–312; *McDonald* v. *Thompson*, 305 U. S. 263;

Bowie v. *Gonzalez*, 117 F. (2d) 11 (C. C. A. 1); *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. (2d) 567 (C. C. A. 3), affirmed, 316 U. S. 517; *Knight* v. *Mantel*, 135 F. (2d) 514 (C. C. A. 8).

The other alternative, which seems to be the only logical and practicable consequence of invalidating the Administrator's definition, is to deny the exemption until the Administrator adopts a valid definition.[41] There is certainly no basis for extending the exemption to respondent and depriving its employees of the benefits of the Act, unless it can be said that respondent would be exempt under any conceivable valid definition, which is plainly not true. Whatever equitable disposition the court might feel called upon to make with respect to persons relying upon the Administrator's allegedly invalid definition,[42] no such equitable considerations would entitle respondent here to an exemption at the expense of its employees.

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[41] This view was taken by the district judge (R. 194) and in *Redlands Foothill Groves* v. *Jacobs*, 30 F. Supp. 995, 1006 (S. D. Cal.). It is unnecessary at this time to consider the bearing of a subsequent valid definition on past pay periods. On this point, see *Manhattan Co.* v. *Commissioner*, 297 U. S. 129; *United States* v. *Morgan*, 307 U. S. 183.

[42] Cf. *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358; *Warring* v. *Colpoys*, 122 F. (2d) 642 (App. D. C.); certiorari denied, 314 U. S. 678; Securities Exchange Act of 1934, 15 U. S. C., sec. 78w (a); Securities Act of 1933, 15 U. S. C., sec. 77s (a). See *Snyder, Retrospective Operation of Overruling Decisions*, 1940, 35 Ill. Law Review 121.

CONCLUSION

The Administrator's regulations defining "area of production," and particularly the provision limiting the number of employees in the establishment where the exemption might apply, are valid. Furthermore, the court below exceeded the province of judicial review in holding part of the definition invalid and purporting to apply the remainder of the definition, thereby extending the exemption to respondent. The decision below should be reversed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

DOUGLAS B. MACGS,
Solicitor,

ARCHIBALD COX,
Associate Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

JAMES H. SHELTON, JR.,
MILTON DENBO,
Attorneys,
Department of Labor.

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APPENDIX I

History of the Several Definitions of Area of Production Under Section 13 (a) (10)

On October 20, 1938, effective October 24, 1938, the Administrator issued the following regulations (3 F. R. 2536):

> Section 536.2 *"Area of Production" as Used in Section 13 (a) (10) of the Fair Labor Standards Act.*—An individual shall be regarded as employed in the "area of production" within the meaning of Section 13 (a) (10), in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products
>
> (a) if he is engaged in such work on a farm and on agricultural or horticultural commodities produced exclusively on such farm, or
>
> (b) if the agricultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediate locality and the number of employees in such establishment does not exceed seven.
>
> Section 536.3 *Petition for Amendment of Regulations.*—Any interested persons or associations wishing a revision of the foregoing regulations may make application to the Administrator in writing to amend Sec-

tions 536.1 and 536.2 by increasing or decreasing the maximum of employees permitted within the exemption as defined. If upon inspection of the petition the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to interested parties or will make other provision for affording interested parties an opportunity to present their view either in support of or in opposition to the proposed changes.

Effective December 22, 1938, the Administrator issued an amended regulation adding to section 536.2 an alternate paragraph numbered "(c)" applicable to dry edible beans as follows (3 F. R. 3072):

* * * * *

(c) with respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this subsection (c), "first concentration point" means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment normally receiving a portion of the beans assembled from other first concentration points.

On February 25, 1939, the Administrator amended Section 536.2 of the regulations by adding an additional subsection "(d)" applicable to Puerto Rican leaf tobacco as follows (4 F. R. 1009):

* * * * *

(d) with respect to Puerto Rican leaf tobacco, if he is engaged in handling, pack-

ing, storing, and drying such tobacco for market in an establishment which is a first concentration point for such tobacco. As used in this subsection (d), "first concentration point" means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing.

Effective April 20, 1939, the Administrator amended section 536.2 of the regulations by adding an additional paragraph "(e)" applicable to perishable and seasonal fresh fruits and vegetables as follows (4 F. R. 1655):

* * * * *

(e) with respect to perishable or seasonal fresh fruits and vegetables, if he is engaged in handling, packing, storing, drying, preparing in their raw or natural state, or canning such products for market in an establishment which is located in the open country or in a rural community and which obtains all of its products from farms in its immediate locality. As used in this subsection (e) "open country" or "rural community" shall not include any city or town of 2,500 or greater population according to the 15th United States Census, 1930, and "immediate locality" shall not include any distance of more than 10 miles.

Effective June 17, 1939, the Administrator amended section 536.2 by changing the words "immediate locality" to "general vicinity" in paragraph (a); and by extending the population-dis-

tance test previously applicable to fresh fruits and vegetables to all agricultural or horticultural commodities. Sections 436.2 and 536.3 were accordingly amended and rearranged as follows (4 F.R. 2436):

* * * * * *

(a) If he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven, or

(b) with respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this subsection (b), "first concentration point" means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment normally receiving a portion of the beans assembled from other first concentration points, or

(c) with respect to Puerto Rican leaf tobacco, if he is engaged in handling, packing, storing, and drying such tobacco for market in an establishment which is a first concentration point for such tobacco. As used in this subsection (c), "first concentration point" means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing, or

(d) if he performs those operations on materials all of which come from farms in the immediate locality of the establishment where he is employed and the establishment is located in the open country or in a rural community. As used in this subsection (d), "immediate locality" shall not include any distance of more than ten miles and "open country" or "rural community" shall not include any city or town of 2,500 or greater population according to the 15th United States Census, 1930.

SECTION 536.3. *Petition for Amendment of Regulations.*—Any interested person or association wishing a revision of the foregoing regulations may submit in writing to the Administrator a petition for amendment thereof, setting forth the changes desired and the reasons for proposing them. If upon inspection of the petition the Administrator believes that reasonable cause for amendment of the regulations is set forth the Administrator will either schedule a hearing with due notice to interested parties or will make other provision for affording interested parties an opportunity to present their views either in support of or in opposition to the proposed changes.

Effective October 1, 1940, the Administrator amended section 536.2 of the regulations by inserting a special paragraph applicable solely to perishable or seasonal fresh fruits and vegetables as follows (5 F. R. 2647):

An individual shall be regarded as employed in the "area of production" within the meaning of Section 13 (a) (10), in handling, packing, storing, drying, preparing in their raw or natural state, or canning

of perishable or seasonal fresh fruits or vegetables for market;

If he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten.

By notices appearing in the Federal Register on September 12 and October 1, 1940, the Administrator postponed until December 1, 1940 and November 1, 1940, the effective date of parts of the regulations with respect to fresh fruits and vegetables (5 F. R. 3634, 3860).

Effective April 1, 1941, the Administrator again amended the regulations to apply the fresh fruit and vegetable definition to all commodities other than "dry edible beans," and "Puerto Rican Leaf Tobacco," so that sections 536.2 and 536.3 read as follows (6 F. R. 1476):

SECTION 436.2 *"Area of Production" as used in Section 13 (a) (10) of the Fair Labor Standards Act.*—An individual shall be regarded as employed in the "area of production" within the meaning of Section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(a) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten, or

(b) with respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this subsection (b), "first concentration point" means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment normally receiving a portion of the beans assembled from other first concentration points, or

(c) with respect to Puerto Rican leaf tobacco, if he is engaged in handling, packing, storing, and drying such tobacco for market in an establishment which is a first concentration point for such tobacco. As used in this subsection (c), "first concentration point" means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing.

Section 536.3. *Petition for Amendment of Regulations.*—Any interested person or association wishing a revision of the foregoing regulations may submit in writing to the Administrator a petition for amendment thereof, setting forth the changes desired and the reasons for proposing them. If upon inspection of the petition the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to in-

terested parties or will make other provision for affording interested parties an opportunity to present their views either in support of or in opposition to the proposed changes.

Effective January 5, 1942, the Administrator amended section 536.2 (c) with respect to Puerto Rican leaf tobacco to read as follows (6 F. R. 5165):

* * * * *

(c) with respect to Puerto Rican leaf tobacco, if he is engaged in piling, bulking, or otherwise handling unstripped tobacco for market in an establishment which is a first concentration point for such tobacco; provided that employees engaged in stripping tobacco or engaged in piling, bulking, or otherwise handling stripped tobacco shall not be deemed to fall within this definition. As used in this subsection (c), "first concentration point" means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing.

No amendment of section 536.2 of the regulations has been made since January 5, 1942.

APPENDIX II

HEARINGS ON "AREA OF PRODUCTION"

(SECTION 13, (a) 10))

Reference No.	Date of hearing	Title	Number of volumes	Number of exhibits
.....	Nov. 14–15, 1938.....	Handling, Storing, or Preparing for market in Their Raw or Natural State, navy, cranberry, kidney, or similar types of dry edible beans.	2	25
48.....	Dec. 9–10, 1938.....	Petition of Cigar Manufacturers of America, Inc. et al.	2	8
54.....	Jan. 9–12, 1939.....	Fresh Fruits and Vegetables.....	4	43
58.....	Feb. 9, 1939.....	Informal Hearing on Petition of Poultry Handlers.	1	.....
71.....	Mar. 27, 1939.....	Petition of American Seed Trade Association.	1	6
72.....	Mar. 29, 1939.....	Petition of Association of Sugar Producers of Puerto Rico.	1	14
73.....	Apr. 3–4, 1939.....	Fresh Fruits and Vegetables: Rehearing (by the Administrator).	2	33
157.....	Apr. 8, 1940.....	Informal Conference on Redefinition of Area of Production.	1	.....
162a....	May 1–4, 1940.....	Packing (but not canning) of Citrus Fruits.	4	76
162b....	May 6–8, 1940.....	Handling, Packing, Storing, Preparing in the Raw or Natural State, but not Canning of Fresh Fruits and Vegetables.	3	63
162c....	May 9–11, 1940.....	Drying and Canning of Perishable or Seasonal Fresh Fruits & Vegetables.	3	98

FINDINGS AND RECOMMENDATIONS OF THE PRESIDING OFFICER

.....	Mar. 14, 1939.....	Release R. 226.....	
.....	July 20, 1940.....	Release G–80.....	

APPENDIX III

Legislative History of Sections 3 (f), 13 (a) (6) and 13 (a) (10) of the Fair Labor Standards Act of 1938

The purpose of this appendix is to trace the legislative history of Sections 3 (f), 13 (a) (6), 13 (a) (10), and the provisions relating to the term and concept "Area of Production" which is found in Section 13 (a) (10) of the Fair Labor Standards Act.

1. S. 2475 as introduced in the Senate May 24, 1937. The hearings.

For convenience the discussion in this appendix will refer only to S. 2475, although a companion bill containing substantially the same terms was introduced in the House at the same time.

As introduced, S. 2475 contained no provision using the words "area of production." The only provisions relating to agriculture were in Sections 2 (a) (7) and 19. Section 2 (a) (7) defined "employee" as not including "any person employed * * * as an agricultural laborer as such terms are defined and delimited by regulations of the Board." Section 19 conferred authority on the Board to make regulations, among other things, defining and delimiting employment in which persons are deemed to be employed as agricultural laborers.

Joint hearings of the bill were held before the Senate Committee on Education and Labor and the House Committee on Labor, June 2, 1937, to June 22, 1937.

At the hearings various witnesses urged that some allowance be made with respect to the maximum hours provision of the bill for employees engaged in handling, packing, processing, etc., perishable fruits, vegetables, or fishery products (Hearings, pp. 152, 373, 967, 1059, 1220).

Several witnesses urged that the agricultural exemption in the bill be broadened. Mr. Horace Herr, representing the National League of Wholesale Fresh Fruit and Vegetable Distributors, urged that Congress should draft the formula for drawing the line between agricultural and industrial activities. He stated:

> In section 2 (a), in connection with the definition of "employee," in paragraph 7, lines 3 to 11, page 4, the question is raised as to whether the Board should decide where the line should be drawn between agricultural labor and labor within the scope of the act, or Congress should draw the line. Is it the congressional intent that this program shall be as inclusive as possible or that its application should be restricted so as to impose none of its obligations upon employers engaged in activities directly affecting agriculture or inseparably intertwined with agriculture in the marketing processes? It may be that wherever the line is drawn, some injustices may result both to the employees, on the exemption side of the line, and to the employers, on the inclusion side of the line, the injustices to the latter resulting from

the labor-cost differential. This question is of some importance in this industry, where the commodities move in their natural state, where certain handling operations are dictated by the highly perishable character of the commodities, and where actual ownership, to a substantial extent, remains with the producer until the commodities are bought by the retail outlet; when the cost of grading, packing, loading for shipment, storage, and other marketing expense is charged back to the grower. There is involved in this question the cooperative packing plants and marketing associations and the movement of commodities, such as apples, into and out of storage. In the Social Security Act, agricultural labor is exempt and the definition of agricultural labor rests with the Commissioner of Internal Revenue. There has been considerable pressure to liberalize the definition. In the [wholesale] fruit and vegetable [distribution industry] code, as approved by both N. R. A. and the Agricultural Adjustment Administration, the line was drawn at the point where the commodity was on board the transportation facility, the code language being as follows:

"The industry as defined shall not include the production nor preparation, assembling, or loading at point of production of commodities for shipment."

It would seem that fixing the limit on agricultural activities, in a program of this kind, so directly relates to the national policy for agriculture, that the Congress, rather than the Labor Standards Board, should draft the formula for the dividing line. The Congress, at least, should say whether the doubt is to be resolved in favor

of the workers or in favor of the farmers (Hearings, pp. 1002–1003).

Mr. John H. Clippinger, representing the same organization, also urged that the bill be amended so as to draw a clear line of demarcation between an agricultural and nonagricultural laborer so as to avoid confusion resulting from the definition of agricultural laborer under the Social Security Act (Hearings, p. 1064).

Mr. Samuel Fraser, representing the International Apple Association, objected to the provisions of the bill which empowered the Board to define agricultural laborer. He contended that—

> All of the costs and charges of packing, packaging, washing, grading, conservation, putting the commodities on board some transportation agency for transportation to market, in the end come squarely out of the pocket of the grower (Hearings, p. 1084).

He suggested the inclusion in the bill of the following definition of agricultural labor:

> For the purpose of this act, the term "agricultural labor" includes all employees engaged in the planting, growing, spraying, harvesting, preparing for market, packing, conserving, processing, transporting, and marketing of fresh fruits and vegetables, and their delivery to storage or to a carrier for transportation to market, no matter by whom employed (Hearings, p. 1096).

Mr. W. S. Campfield, representing the Virginia State Horticultural Society urged that the uncertainty inherent in the definition of agricultural labor be removed, and that "agriculture should be

either all in or all out to avoid conflicts." He called particular attention to the dissatisfaction that would be occasioned by holding that a packing crew was within the provision of the bill while those engaged in picking fruit were exempt. He urged the adoption of the amendment proposed by Mr. Fraser.

Mr. Idus T. Gillett of the Dowlett Packing Co. of Canutillo, Texas, suggested that an exemption be given small canners operating in rural communities and employing fewer than twenty regular employees on a "year-round basis." He stated that raising wages in a cannery located in an agricultural community substantially above the prevailing wage in the community would cause chaos (Hearings, p. 1219).

Mr. Clippinger also argued that the exemption of employers with a small number of employees would upset the wage structure in the wholesale fruit-and-vegetable-distributing industry.

2. S. 2475 as reported by the Senate Committee on Education and Labor July 8, 1937 (Seventy-fifth Congress, first session, Senate Report No. 884)

The Senate Committee on Education and Labor rewrote the bill reporting an amendment in the nature of a substitute for the original bill.

In the amended bill the agricultural exemption was enlarged but the term "area of production" was not used.

The agricultural exemption, appearing in Section 2 (a) (7) read as follows:

> nor shall "employee" include any person
> * * * employed in the taking of fish,

> sea foods, or sponges; or any person employed in agriculture. As used in this Act, the term "agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, forestry, horticulture, market-gardening, and the cultivation and growing of fruits, vegetables, nuts, nursery products, ferns, flowers, bulbs, livestock, bees, and poultry, and further includes the definition contained in subdivision (g) of section 15 of the Agricultural Marketing Act, approved June 15, 1929, as amended, or any other agricultural or horticultural commodity, and any practices ordinarily performed by a farmer as an incident to such farming operations.

The report accompanying the bill contained only a brief statement that employee is defined so as to exclude—

> persons engaged in agriculture and such processing of agricultural commodities as is ordinarily performed by farmers as an incident of farm operations (75th Congress, First Session, Senate Report No. 884).

Senator Black, chairman of the committee in charge of the bill, in opening the Senate debate of the bill stated that it—

> specifically excludes workers in agriculture of all kinds and of all types. There is contained in the measure, perhaps, the most comprehensive definition of agriculture which has been included in any one legislative proposal.
>
> We have placed together in the bill definitions of agricultural work which have been fixed from time to time in other legis-

> lative enactments and in addition to that we have drawn liberally from Mr. Webster's definition of agriculture (81 Cong. Rec. July 27, 1937, p. 7648).

Senator Tydings raised the question whether under the definition of agriculture an employee threshing wheat on another man's farm would be exempt (81 Cong. Rec. July 27, 1937, p. 7653). The exemption of seasonal canneries were discussed at pages 7655 and 7656.

The meaning of the word "dairying" as used in the agricultural exemption was the subject of a colloquy between Senator Pope and Senator Black which appears at page 7656.

The concept of "area of production" was first injected into the debate by Senator Copeland who read a telegram from the International Apple Association urging that the definition of agriculture be amended by adding the following:

> Or by an employee in connection with preparing for market, in their raw or natural state within the area of production, fresh fruits and vegetables, including packing, packaging, storing, transporting, and marketing of said commodities (81 Cong. Rec., July 27, 1937, p. 7656).

Senator Copeland continued:

> That is the proposed amendment. The argument is this:
>
> "This amendment applies only to fresh fruits and vegetables in their raw and natural state within the area of production and does not extend to canning or processing or any operations which change them from their raw or natural state. The amendment would then make paragraph 7

the same in principle as recognized by N. R. A. and A. A. A. and under which the fresh fruit and vegetable industry operated. Under modern conditions, developed by necessity, it is of utmost importance to multitudes of small growers from coast to coast that packing-house operations and storing within the area of production be exempted; otherwise, community packing and uniformity of grade will be disrupted and, moreover, small individual growers are not in position to equip themselves with highly expensive washing and grading machinery. All of these costs come out of growers' pockets. Bear in mind we are asking that the amendment apply only to fresh fruits and vegetables which are highly perishable and in their raw and natural state only, and within the area of their production. There is well-established precedent for this under the carefully considered position taken by N. R. A. and A. A. A." (81 Cong. Rec., July 27, 1937, p. 7656).

Senator Black replied that—

The committee, after careful consideration reached the conclusion that the definition of employee as given in paragraph (7) of section 2, and which is the broadest definition that has ever been included in any one act, was sufficient to include every genuine bona fide farming activity (81 Cong. Rec., July 27, 1937, pp. 7656–7657).

He continued:

So far as I recall, no member of the committee favored exempting, for instance, meat-packing houses. I use that as an illustration and not that it is connected with

> the suggestion made by the Senator from New York. The committee was not in favor of exempting the packing business as it related to many agricultural products. I refer to packing as a business. The farmer or the apple grower has a perfect right, of course, to pack his own apples either alone or in cooperation with his farming neighbors, I should say (81 Cong. Rec., July 27, 1937, p. 7657).

In response to questions by Senator Overton as to whether cotton ginning or sugar processing, if done by a farmer on a farm, would be exempt, Senator Black indicated that the test would be whether such processes were "ordinarily performed by a farmer as an incident to his farm operations" (81 Cong. Rec., July 27, 1937, pp. 7658–7659).

Senator Schwellenbach indicated that the bill put the small apple grower at a disadvantage. He stated:

> If I may, I should like to follow through some of the questions asked by the Senator from New York [Mr. Copeland] which the Senator from Alabama answered by reference to the growing and sale of watermelons.
>
> When an apple grower picks his apples and takes them into his own warehouse, as the Senator from New York has described, and in that warehouse packages them and then stores them, or perhaps first stores them and then packages them, the work being done by the farmer on his own farm, there is no dispute about the fact that it is an agricultural operation. I should like to say frankly, however, that when he takes the apples into market and sells them on the streets of New York City, as the Sen-

ator points out, I cannot see that is an agricultural operation.

What I am interested in is the small apple producer who has a ranch so small that he cannot afford to maintain upon his own ranch a warehouse with the necessary machinery and equipment which such warehouses now must have under the rules and regulations of the Department of Agriculture on the question of spray tolerance. It seems to me that the bill, under the definitions as they now stand, places at a considerable disadvantage the man who is too small an operator to perform these operations upon his own farm, and who must send his apples to a central warehouse to have the same processing done—by "processing" I do not mean canning; I mean the removal of the spray—and the same sort of storage, and who must bear all these increased costs, as compared with the larger operator who can do these things upon his own place of business.

I cannot see anything fair about that sort of discrimination. It seems to me the point of difference should be when the agricultural operation stops.

The picking of the apples is an agricultural process. If the man does it on his own ranch, the storing of the apples and the washing of the apples and the packing of the apples are all agricultural processes. If we leave the bill the way it now stands, it is going to mean that the large producer on the large ranch who can afford to maintain the equipment on his own ranch is going to have an unfair advantage over the small man who has only 5 or 10 acres, and who has to send his crop to a central warehouse, or who may join with others in co-

operative warehouses and there have the same processes performed.

I think—and I should like to ask the reaction of the Senator from Alabama to the suggestion—that the line of distinction might be made at the point of agricultural operation; that so long as the operation is purely an agricultural one, it should come within the exemption. When it becomes a processing operation, a canning operation, it ceases to be an agricultural operation. When it becomes a marketing operation, and the product gets to the railroad station, or leaves the warehouse for the purpose of going to the railroad station, it ceases to be an agricultural operation.

I should like to have the Senator's reaction to that suggestion.

Mr. BLACK. I think perhaps I can give the Senator an illustration which will demonstrate how difficult it is to draw the line at the point he mentions.

Going into another phase of farming, let us take the man who raises hogs. A great many farmers who raise hogs kill their hogs on their own farms. They prepare the hogs for market on their own farms and then send out the product. As the bill is framed, there would be no possible manner in which their employees could be included under the provisions of the bill, because that would clearly be farming; but if we should attempt to draw the line of distinction which the Senator has mentioned we would find that we should have to exclude meat packers, whom I know the Senator would not believe it desirable to exclude, and we should thereby step into a field which we do not wish to enter (81 Cong. Rec., July 27, 1937, pp. 659–9907).

Senator Reynolds suggested that an amendment exempting employers of ten or less employees would allay the fears of those who believed that small canners should be exempt (81 Cong. Rec., July 27, 1937, p. 7662).

The concept of "area of production" was proposed by Senator Schwellenbach in an amendment which would add to the definition of agriculture the following:

> the term "person employed in agriculture," as used in this act, insofar as it shall refer to fresh fruits or vegetables, shall include persons employed within the area of production engaged in preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state (81 Cong. Rec., July 30, 1937, p. 7876).

The following discussion took place on the proposed amendment:

> Mr. SCHWELLENBACH. Mr. President, on day before yesterday I discussed the situation upon which the amendment is based.
>
> The amendment is very strictly drawn in an effort to limit the operations defined therein purely to those of an agricultural nature. I should like to say that, so far as I am concerned, I cannot agree with the position taken by the Senator from Mississippi [Mr. Harrison], indicating that there might be some danger about extending this measure to agriculture. So far as I am concerned, I think there would be a regulation of hours and wages for all workers in the country; but the bill does not attempt to do that. The bill attempts to exempt agricultural workers. The situation in which I am principally interested is a situ-

ation involving the apple industry, and it is one in which, unless an exemption of this kind is made, there will be a discrimination against the small producer and in favor of the larger producer.

In other words, in a small apple operation of 5 or 10 or 15 or 20 acres, it is not possible for the owner of the ranch to purchase and maintain on the ranch the necessary machinery which is required in the washing operation under the rules and regulations of the Department of Agriculture. It is not possible for him to provide on his ranch the necessary storage space to store the apples until such time as it is possible to take them to market. It is not possible on the small ranch to supply the space for packing the apples. Therefore, it is necessary for such a farmer either to join other farmers in a cooperative or to send his apples to a packing house, and have these operations, which are purely agricultural operations, performed elsewhere than at the situs of the ranch or the farm.

The purpose of this amendment is to give protection against that situation, and to make it possible for the small fruit and vegetable producer to operate upon the same basis as the large fruit and vegetable producer.

Mr. CONNALLY. Mr. President, will the Senator yield?

Mr. SCHWELLENBACH. I yield.

Mr. CONNALLY. Of course, apple raisers are already exempt, are they not, under the term "agricultural workers"?

Mr. SCHWELLENBACH. The amendment applies only to the packing, storing, and preparing of fresh fruits and vegetables.

Mr. CONNALLY. The effect of the amendment is to exempt all employees of apple-packing plants; is it not?

Mr. SCHWELLENBACH. If they are engaged in the area of production, and so long as the apples are in their natural or raw state; yes, sir.

Mr. COPELAND. Mr. President, did the Senator include in his amendment the word "transportation"?

Mr. SCHWELLENBACH. No; I did not include the word "transportation," because I do not believe that the transportation should be exempt; and I did not include "processing."

Mr. COPELAND. If the Senator will yield further for a moment, we have the same problem of the apple grower in my State. The small orchardist has seasonal work in the neighborhood in the picking, sorting, storage, and transportation of his apples. What I mean by "transportation"—perhaps it is not the right use of the term—is the carriage of apples in the ripe season to the nearby markets, which in my case is New York City, and the work of those who drive the trucks and rush the apples from the cooperative or private storage house to the city; so does not the Senator think that word, too, should be used?

Mr. SCHWELLENBACH. I will say to the Senator that as the amendment was originally prepared it had "transportation and marketing" in it. I have tried to limit the amendment to what I consider agricultural operations. Perhaps I am incorrect about it, but I do not feel that taking apples into market and selling them are parts of agricultural operations.

Mr. COPELAND. I live in Rockland County, N. Y., which is on the New Jersey line; and while the city of New York is the largest market for the apples raised in Rockland County, a great many apples are disposed of in Newark, New Jersey. The truck of the farmer carries the fruit to the market in Newark, which is a standard market where merchants go to get material, and the farmer stays there on the market stand until he can dispose of his truckload of apples. That is what I have in mind, because, of course, the transaction of getting rid of the produce may take late afternoon and all night. So as I originally introduced the amendment I had in it "transportation and marketing," and also the language the Senator used, which makes it clear that the transaction is in the neighborhood; that it is not a great, big transaction involving a trip across the continent.

Have I made clear the thought I have in mind to the point where the Senator will accept the words "transportation and marketing" and make them an addition to his amendment?

Mr. SCHWELLENBACH. I will say to the Senator from New York that I studied the amendment very carefully; and when we get beyond the point of preparing, packing, and storing—those operations which can be done on the farm by the large farmer as compared with the small one—I feel that we are going beyond the point of agricultural operations, and that the work really is not agricultural work.

Mr. COPELAND. Mr. President, I disagree with the Senator, and do so, of course, in all good spirit; but what I am saying is founded upon actual knowledge. The

farmer may be a very small farmer. He may not produce more than one or two or three hundred barrels of apples, but in order to get them to market he has to put them on a truck—his own truck or a hired truck—and go the short distance, perhaps 20 miles, to the town where there is a central market where he may dispose of his product. That seems to me to be very obviously a part of the agricultural transaction, and yet I fear that I have not been able to convince the Senator from Washington to that effect.

Mr. SCHWELLENBACH. Possibly I have convinced myself the other way so thoroughly that the Senator's statement has not served to change my mind about the matter.

Mr. COPELAND. As a matter of fact, is not the problem quite a different one in the great apple country of the West, where there are tremendous crops of apples which are taken in large quantities to the railroad station and shipped on to New York, where we buy and eat those apples; while on the other hand, the small farmer in my section is not commercially engaged in the orchard business, as they are in the West, or as they are on the great plantation of the junior Senator from Virginia [Mr. Byrd]? What the small farmer of my sections does is a part of his farming transaction. He takes his apples to market and gets rid of them; and I want to help him as much as I can.

Mr. MCCARRAN. Is it not true, in keeping with what the Senator from New York has said, that in the State of the Senator who offered this amendment, the real truth is that the farmer takes the apples to a processing plant? I myself have seen this operation in the Senator's State, though

the Senator knows about it much better than I do. The farmer takes the apple from the orchard to the processing plant. In other words, that is where the apple is really graded and boxed and prepared for shipment.

It seems to me that the Senator from New York is entirely correct in stating that up to the point where the apple is boxed and ready for shipment it is and remains a product of the farm and is handled by the farmer. It seems to me the Senator is forgetting the real point of his amendment.

Mr. REYNOLDS. Mr. President, will the Senator from Washington yield to me?

Mr. SCHWELLENBACH. I yield

Mr. REYNOLDS. A moment ago, in explaining his amendment, the Senator from Washington made reference to orchards covering 15 or 20 acres. Am I to assume that the Senator had in mind the protection of the small producer?

Mr. SCHWELLENBACH. The production of the small producer as compared with the larger producer. In other words, the small producer cannot afford to have the capital investment in the warehouse, the washing machinery, all of the necessary incidentals to this operation, while the larger producer can afford them, and he is exempt from the provisions of the bill.

Mr. REYNOLDS. The small producer would hardly have more than 8 or 10 men employed in the gathering of a crop?

Mr. SCHWELLENBACH. He takes his apples to a warehouse, however, and there are more than 8 or 10 employed in the warehouse.

Mr. REYNOLDS. In that instance, would not the Senator's amendment exclude from the provisions of the bill the larger cold-storage plants, where there are employed hundreds of men, and would not the amendment of the Senator from Washington really exempt from the provisions of the law the larger refrigerating plants throughout the entire country?

Mr. SCHWELLENBACH. I limit my amendment to employees who are working upon products from the immediate area, products in their raw or natural state, in their preparation, packing, and storing. I do not think that in those operations there would be any large or enormous plants such as the Senator has in mind.

Mr. REYNOLDS. I gathered from the terms of the amendment that it would actually remove from the provisions of the bill the larger cold-storage plants throughout the country. Of course, many of them we find in the cities of New York, Chicago, St. Louis, San Francisco, and Seattle.

Mr. SCHWELLENBACH. Those are not in the immediate production area.

Mr. REYNOLDS. But they would be included.

Mr. SCHWELLENBACH. No; they would not be included because they are not in the immediate production area.

Mr. COPELAND. Mr. President, may I ask the Senator from North Carolina a question?

Mr. SCHWELLENBACH. I yield to the Senator from New York.

Mr. COPELAND. Let me ask the Senator from North Carolina whether in all probability the point I have in mind is not

provided for in the amendment he offered, which has just been adopted. His amendment, as I understand, applies the bill to those who employ 10 or more persons. Is that correct?

Mr. REYNOLDS. That is correct.

Mr. COPELAND. As the Senator understands his amendment, does it mean that to a fruit farm such as I have described, unless there are in excess of 10 persons, the act would not apply?

Mr. REYNOLDS. Under my amendment any firm, individual, association, or corporation employing 10 or less number of persons would not be subject to the provisions of the bill. That is why I made inquiry a moment ago as to whether or not the small producers of apples would not be reached by it. What I am particularly interested in ascertaining as to the amendment is whether or not it will be of material benefit to the small producer. I expect in a few moments to offer an amendment eliminating tobacco warehouses. There are 57 of them in North Carolina, and their work is seasonal. Eliminating them from the provisions of the proposed law would benefit the tobacco farmers of my State. So I am assuming that the amendment offered by the Senator from Washington would actually be of benefit to the small fruit growers of his State. That is the intent, is it not?

Mr. SCHWELLENBACH. That is the purpose of it.

Mr. CONNALLY. Mr. President, I should like to ask the Senator from Washington a question. Would not the effect of his amendment be to exempt all industrial warehouses and packing plants in apple

territory? There is no limit. The condition is that they are packing plants, and if they are, they are exempt.

Mr. SCHWELLENBACH. If a packing plant is working upon fresh fruits or vegetables, in their raw or natural state, within the immediate production area, it would be exempt.

Mr. CONNALLY. My understanding is that the largest apple packing plant in the world is located at Winchester, Va., right in the heart of a great apple-producing region? That would be exempt, would it not?

Mr. SCHWELLENBACH. If the work done in that plant is as described in the amendment, it would be exempt.

Mr. CONNALLY. Why should a man engaged in packing apples be exempt, and a man packing lemons or oranges or grapefruit, not be exempt? What is there about apples that makes them entitled to exemption?

Mr. SCHWELLENBACH. The purpose of the amendment is not for protection of the packing plant or for the protection of the owners of the packing plant. The cost is paid by the producer. These packing plants just pass the cost back to the man who produces the apples. The farmer pays the bill. The purpose of the amendment is to permit the small farmer, who cannot afford to have his own warehouse and cannot afford to have his own washing machine, to be placed upon a parity with the larger producers, who can afford to maintain their own warehouses and their own washing machines and their own equipment.

Mr. BARKLEY. Mr. President, will the Senator from Washington yield?

Mr. SCHWELLENBACH. I yield.

Mr. BARKLEY. I suppose that any establishment dealing with apples as they come from the orchard is dealing with them in their raw state.

Mr. SCHWELLENBACH. That is correct.

Mr. BARKLEY. There are many things which may be made from apples—for instance, applesauce, which I presume is not included within the regulations of the bill. But if we provide for the exemption of plants which are dealing with apples as a raw material, we include practically all plants which deal with apples, because they deal with them only as raw materials. Is that true?

Mr. SCHWELLENBACH. No; I think the Senator is incorrect in that suggestion. The exemption applies when they deal with them in their raw or natural state. If they start making cider out of them, or start making applesauce out of them, then they are processing and not dealing with them in their raw or natural state.

Mr. BARKLEY. They are dealing with the apple in its raw state?

Mr. SCHWELLENBACH. Not after they put it through the first grinder. It then ceases to be in the raw or natural state.

Mr. BARKLEY. Somewhere between the apple and the cider this proposed law will take effect.

Mr. SCHWELLENBACH. I do not think there would be any difficulty as to a construction of that kind, because once it gets to the point which the Senator from Kentucky describes, then it becomes processing.

and there is no inclusion of processing in the amendment.

Mr. BLACK. Mr. President, will the Senator yield to me?

Mr. SCHWELLENBACH. I yield.

Mr. BLACK. Would the amendment apply to a cannery?

Mr. SCHWELLENBACH. No.

Mr. BLACK. What would be the definition of the word "prepare"?

Mr. SCHWELLENBACH. "Prepare in the natural or raw state" is washing.

Mr. BLACK. It is limited, as the Senator understands, to the fruit as it actually comes from the tree?

Mr. SCHWELLENBACH. Yes.

Mr. BLACK. The Senator knows that the committee has tried to provide and is favorable to a complete exclusion of activities which are purely agricultural. We have tried to write the bill in such a way as to take care of that situation. What about the "area"? What would be the definition of "area"? Would it not be possible to define it more clearly to get the effect?

Mr. SCHWELLENBACH. *I gave considerable thought to that. I do not believe it is possible, and that is something which the board, which has been accused of receiving too much power, would have to decide. It would have to provide a definition of "immediate production area."* [Italics supplied.]

Mr. BLACK. The Senator believes that in order to obtain the effect of what the committee has tried to do in writing the bill, it is essential that this amendment be adopted insofar as this particular type of business is concerned?

Mr. SCHWELLENBACH. I feel so, and it is for that reason that I am offering the

amendment. (81 Cong. Rec., July 30, 1937, pp. 7876, 7877, 7878.)

At the suggestion of Senator Black that Senator Pepper be consulted regarding the proposed amendment, it was temporarily withdrawn.

Senator Reynolds proposed an amendment exempting from the provisions of the Act "tobacco warehouses, their employers or employees." (81 Cong. Rec., July 30, 1937, p. 7878.)

Senator Barkley suggested that the amendment should not be extended to warehouses "that are not seasonal * * *":

> There are some tobacco warehouses to which the tobacco is delivered during the tobacco season, but during almost the whole year the warehouse operators engage in the process of prizing and stripping and stemming. I do not think the Senator means to exempt warehouses of that sort that engage in more or less year-round activity. (81 Cong. Rec., July, 1937, pp. 7878–7879.)

The amendment was subsequently enlarged to include cotton compressors, cotton warehouses, cotton ginning and baling.

The amendment was subsequently rejected by a tie vote. (81 Cong. Rec., July 30, 1937, p. 7887.)

Senator Overton urged that cotton ginning was a step in the process of getting the farmers' agricultural product to market and that since the cost of ginning was imposed directly upon the farmer the operation should be exempt as an agricultural activity. (81 Cong. Rec., July 30, 1937, p. 7880.)

Senator McGill proposed an amendment making agricultural exemption applicable to practices ordinarily performed "on a farm" as well as by a

farmer, and adding to that exemption the words "including delivery to market." The discussion on this amendment follows:

Mr. McGILL. Mr. President, the purpose of the amendment is to broaden the definition of "employee" as applied to agriculture. I can readily see how some have construed the language of the bill to mean that one who operates a threshing machine outfit and employs a crew and is employed by a farmer to thrash his wheat might be included under the provisions of the bill. Likewise, those who are engaged in harvesting and delivering to market might be included. It is my understanding, although no definite commitment has been made, that the amendment is not opposed by those in charge of the bill. If I am correct, I should like to have the amendment agreed to.

Mr. GEORGE. Is it the purpose of the amendment to exempt those who thresh grain?

Mr. McGILL. Those who thresh grain, who harvest grain, and deliver it to market.

Mr. GEORGE. Would the amendment also apply to the harvesting of any other crop?

Mr. McGILL. It would apply to any commodity produced on a farm.

Mr. GEORGE. Would it apply to peanut pickers who pick in the fields?

Mr. McGILL. Yes.

Mr. GEORGE. And who move peanuts to the market?

Mr. McGILL. Yes; that is my understanding.

Mr. GEORGE. I should like to ask the Senator from Alabama if that is his interpretation of the amendment.

Mr. BLACK. That is my interpretation of the amendment, and it is my belief that the bill as originally drawn covers what is now contained in the language of the amendment; but some Senators who were doubtful about it wished to draw a clarifying amendment.

Mr. GEORGE. I am sure it does not in fact do so, because the picking of peanuts and the harvesting of grain in my part of the country are done purely by contract with outsiders, who in a great many cases have no farm interest. What I want to get at is whether, in the opinion of the Senator from Alabama, the language of the amendment of the Senator from Kansas includes any field crop that is threshed, as in the case of grain, or picked, as in the case of peanuts in the field.

Mr. BLACK. Unquestionably.

Mr. MCGILL. I may say to the Senator from Georgia and other Senators that is my object to make the language of the amendment broad enough to include all work done on a farm, so long as it is incidental to agricultural purposes.

Mr. GEORGE. And so long as it is merely preparatory and necessarily preparatory to the marketing of the field crop. Is that true?

Mr. MCGILL. That is true; and the language would also include all labor performed in making delivery to market.

Mr. GEORGE. I thank the Senator.

Mr. COPELAND. Of course, that would take care of my apple man, about whom I have been worrying, would it not? It would take care of the farmer who takes his crop of apples to the market, would it not?

Mr. McGILL. That is correct. (81 Cong. Rec., July 30, 1937, p. 7888.)

The amendment was adopted (81 Cong. Rec., July 30, 1937, p. 7888).

Senator McAdoo proposed an amendment substituting for the language in the definition of agriculture relating to practices ordinarily performed in connection with farming operations, the following:

> Any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or natural state, any products derived from any of the above agricultural pursuits. (81 Cong. Rec., July 31, 1937, p. 7927.)

The following discussion ensued:

> Mr. McADOO. Mr. President, under the pending bill agriculture is excluded, but the definition of agriculture in the bill is not sufficiently broad to include work so closely connected with farming as to be substantially a part of it, such as packing, storing, and preparing for market.
>
> Further, it does not cover services which, in my State—California—where producer cooperatives flourish, are largely performed for the farmers by the cooperative associations of which the farmers are members. Among such groups in California may be mentioned the fruit growers' exchange, the raisin growers, the prune growers and others of a similar character. The practice in these cases is for the laborers to work for the association—that is, the cooperative—rather than for the individual farmer, and the association does the packing and pre-

paring for market, which elsewhere is generally done by the farmer himself.

These agricultural commodities are highly perishable, and the work which must be done by the packing houses and on the farms varies greatly with temperature variations. Twenty-four hours in advance one cannot know whether the crop must be moved. So, to fix rigid hours of labor in such cases would be to ruin the producers, as the crop must be handled quickly with the workers available. The broadening of the definition as I have suggested is not only directly in line with the object of the bill but will also protect the farmers, who, in my State at least, are engaged in a method of marketing, packing, and handling their crops which may differ from the methods employed in other States.

Mr. BARKLEY. Mr. President, will the Senator yield?

Mr. MCADOO. I yield.

Mr. BARKLEY. Regardless of the merits of the first part of the Senator's amendment, on which I do not wish to comment, the last part seems to me to make possible the interpretation that the exemption would apply to any product derived from agricultural products all through the process of manufacture, no matter to what extent or degree.

I appreciate what the Senator is trying to do; he wishes this proposed law to be inapplicable to the operations referred to by him. He seeks to strike out the language in lines 13 and 14, and proposes to substitute therefor the words—

"Any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or

natural state, any products derived from any of the above agricultural pursuits."

"Any products derived from any of the above agricultural pursuits" might mean the manufacture of shoes, which come, of course, from leather, which comes from hides, which come from cows. It might be regarded to follow up the manufacture of horse collars, which are made of leather and straw, which are agricultural products. I am wondering whether the Senator wishes his amendment to go that far?

Mr. McADOO. I had not intended it to cover horse collars or shoes, I will admit.

Mr. BARKLEY. Horse collars are manufactured from products derived from agriculture, as the Senator knows, both as to the leather and the straw.

Mr. McADOO. Almost everything in the form of food and clothing is manufactured from products of the farm.

Mr. BARKLEY. Yes; but I do not think the Senator wants his amendment to follow these things from the farm through all the factories so as to exclude them from the operation of the bill because they are "derived from agricultural pursuits."

Mr. McGILL. Yesterday afternoon the Senate amended the lines to which the Senator's amendment applies by inserting in line 13, after the word "farmer," the words "or on a farm," and also by inserting in line 14, after the word "operations," the words "including delivery to market," it being the purpose of those amendments to exclude from the bill all labor performed on a farm, whether by contract with the farmer or otherwise, and to exclude all labor connected with the delivery to market of commodities produced on a farm. Does

not that cover what the Senator has in mind for his amendment?

Mr. McADOO. I do not think it is sufficiently broad. I may say to the Senator from Kansas so much of the preparation of our crops in California is through farm cooperatives that the alterations which have been made in the amendment I think do not widen it as much as is needed. I think, perhaps, I can meet the objection raised by our distinguished leader by omitting in lines 5 and 6 of my proposed amendment the concluding part, namely, the words "products derived from any of the above agricultural pursuits."

Mr. BARKLEY. That is the language I was afraid of, and I think that the Senator's amendment would be improved by eliminating those words.

Mr. McADOO. I am willing to strike out that part of the amendment and to submit the amendment in that form.

Mr. HATCH. Mr. President, will the Senator yield for a question?

Mr. McADOO. I yield.

Mr. HATCH. Would the Senator be willing to add, in lieu of the words which he now says he is willing to strike out, the language proposed by the Senator from Kansas [Mr. McGill] relating to delivery to market, say, the words "including delivery to market"?

Mr. McADOO. I have no objection to that.

Mr. HATCH. I believe, then, the Senator's amendment would cover everything included by the amendment of the Senator from Kansas.

Mr. McGILL. Mr. President, will the Senator from California yield?

Mr. McADOO. I yield.

Mr. McGILL. In response to what the Senator from New Mexico has just said, I will state that I feel the amendment adopted yesterday is broader than the amendment proposed by the Senator from California, by virtue of the fact that no limitation was placed in the amendment adopted yesterday such as mentioning harvesting, packing, and operations of that character. The amendment adopted yesterday was intended to include, and I think it does include, all kinds of labor performed on a farm and all kinds of labor in connection with delivering agricultural products to market. In my judgment, it includes more than does the amendment proposed by the Senator from California and is broader in its terms. I hope that the amendment adopted yesterday will remain in the bill and that the amendment of the Senator from California, by virtue of the narrower terms carried in it, will be rejected.

Mr. McADOO. Mr. President, the amendment suggested by me is not intended to eliminate the amendment to which the Senator from Kansas referred.

Mr. McGILL. But it strikes out the amendment to which I refer.

Mr. McADOO. Has the Senator the amendment before him?

Mr. McGILL. It was adopted yesterday and is in the Record. The Senator's amendment, if agreed to, would strike out entirely the lines covering the amendment to which I refer.

Mr. PEPPER. I ask the Senator from California if it would not meet his objection and at the same time preserve the liberal amendment inserted yesterday,

which was offered by the Senator from Kansas [Mr. McGill], to let the amendment of the Senator from California come after the amendment of the Senator from Kansas, so that the bill would provide:

"And including any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or natural state."

Mr. McADOO. I consider that of the utmost importance where a large part of the services are rendered through farm cooperatives, and for that reason, while I do not want to affect the amendment of the Senator from Kansas, nevertheless I think the suggestion of my friend from Florida is worthy of consideration.

Mr. MCGILL. I appreciate the purpose of the Senator from California, but my judgment is that his amendment will operate simply as a limitation to the amendment I offered and will not broaden its scope.

Mr. ADAMS. The Senator from California has stricken from his amendment the clause "any products derived from any of the above agricultural pursuits," so that it merely applies to processing without saying whether it is an agricultural product or not. He has stricken out the definition of agricultural products.

Mr. PEPPER. The Senator from California has not stricken out anything, according to his later suggestion. He merely suggests that he will let the provision be added at the end of the amendment of the Senator from Kansas, so that it will take care of what he has in mind without interfering with the exemptions

which other Senators desire to have incorporated in the bill.

Mr. McADOO. From a hasty examination of the amendment which the Senator from Kansas (Mr. McGill) has brought to my attention, I cannot see how my amendment, if inserted in the bill, would have the effect which has been suggested. But, on the other hand, my amendment takes care of a situation involving the use of cooperatives.

Mr. GEORGE. I suggest to the Senator from California that, in my opinion, the amendment offered by the Senator from Kansas (Mr. McGill) yesterday is broader than his amendment, because it takes care of all operations, whether performed by cooperatives or by persons under contract or by persons who have merely been employed for a particular job. To enumerate even them in a succeeding clause, or to recite the things that are included, would thus, of course, under the well-known rule of construction, form a limitation upon what is first stated as a broad general proposition. I think the Senator's purpose is absolutely accomplished by the amendment offered yesterday by the Senator from Kansas.

I may say to the Senator from California that I had in mind precisely what he has in mind, but with reference to different products. After examining the amendment of the Senator from Kansas I concluded that it covered all those cases as well as the cases which I think the Senator himself has in mind.

Mr. McADOO. Then I shall ask that further consideration of my amendment be deferred for the moment. I should like now to offer a second amendment to the amend-

ment of the committee. (81 Cong. Rec., July 31, 1937, pp. 7927, 7928, 7929.)

An amendment proposed by Senator Borah reading as follows:

> And provided further, that the provisions of this paragraph (c) shall not apply to employees employed in a plant located in dairy-production areas in which milk, cream, or butterfat are received, processed, shipped, or manufactured if operated by a cooperative association as defined in the Farm Credit Act of 1933—

was adopted. (81 Cong. Rec., July 31, 1937, p. 7947.)

An amendment proposed by Senator Overton including the ginning and baling of cotton in the defmition of agriculture was rejected. (81 Cong. Rec., July 31, 1937, pp. 7951–7952.)

An amendment proposed by Senator Reynolds exempting from the provisions of the act employers of five or fewer than five persons was rejected. (81 Cong. Rec., July 31, 1937, p. 7948.)

Mr. Schwellenbach's amendment relating to persons employed within the area of production in the preparation, etc., of fresh fruits and vegetables, was adopted. (81 Cong. Rec., July 31, 1937, p. 7949.) The bill was passed by the Senate on July 31, 1937, by a vote of 54 to 28. (81 Cong. Rec., July 31, 1937, p. 7957.)

3. S. 2475 as reported by the House Committee on Labor August 6, 1937 (Seventy-fifth Congress, first session—H. Report No. 1452)

S. 2475 as passed by the Senate was referred to the House Committee on Labor. As reported

on August 6, 1937, the bill contained the following provision relating to agriculture.

> Section 2 (a) (7) provided that the term "employee" shall not include any person employed in the taking of fish, sea foods, or sponges; or any person employed in agriculture. As used in this Act, the term "agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, forestry, horticulture, market-gardening, and the cultivation and growing of fruits, vegetables, nuts, nursery products, ferns, flowers, bulbs, livestock, bees, and poultry, and further includes the definition contained in subdivision (g) of Section 15 of the Agricultural Marketing Act, approved June 15, 1929, as amended, or any other agricultural or horticultural commodity, and any practices performed by a farmer or on a farm as an incident to such farming operations, including delivery to market. Independent contractors and their employees in transporting farm products from farm to market are not persons employed in agriculture.
>
> Section 2 (a) (10) defined *oppressive child labor* as meaning a condition of employment under which "any employee (as defined in the Act to exclude employees of agriculture) under the age of sixteen years. * * *
>
> Section 2 (a) (20) provided that "the term 'person employed in agriculture' as used in this Act, insofar as it shall refer to fresh fruits or vegetables, shall include persons employed within the area of production engaged in preparing, packing, or

storing such fresh fruits or vegetables in their raw or natural state."

Section 4 (c) (5) provided that the provisions of that subsection relating to the Board's power to declare maximum workweeks "shall not be applicable with respect to any person employed in connection with the ginning, compressing, and storing of cotton or with the processing of cottonseed, the canning or other packing or packaging of fish, sea foods, sponges, or picking, canning, or processing of fruits, or vegetables, or the processing of beets, cane, and maple into sugar and syrup, when the services of such person are of a seasonal nature: *And provided further,* That the provisions of this paragraph (c) shall not apply to employees employed in a plant located in dairy production areas in which milk, cream, or butterfat are received, processed, shipped, or manufactured if operated by a cooperative association as defined in Section 15, as amended, of the Agricultural Marketing Act."

Section 4 (c) (5) provided that "the provisions of this subsection shall not apply to employees engaged in processing or packing perishable agricultural products during the harvesting season";

Section 16 authorized the Board to make regulations including but not limited to regulations defining technical and trade terms used in the Bill.

The only changes proposed by the Committee were:

(1) Striking "ordinarily" from the definition of agriculture so that that definition included any practices performed by a farmer on a farm as an incident to farm operations without qualifications.

(2) Adding a provision to the definition of agriculture excluding "independent contractors and their employees engaged in transporting farm products from farm to market."

(3) Substituting for the words "ginning and baling" in the exemption from the hours provision of the Bill in Section 4 (c), the words "ginning, compressing and storing" and including in that exemption "the processing of cottonseed."

(4) Striking from the exemption from the hours provision in Section 4 (c) the reference to the Farm Credit Act of 1933 and substituting a reference to Section 15, as amended, of the Agricultural Marketing Act.

The report accompanying the Bill contained only the following comment:

> Air-transport employees subject to title II of the Railway Labor Act are also excluded from the definition of "employee" as are all persons employed in agriculture. "Agriculture" is defined to include, among other things, practices ordinarily performed by farmers or on a farm as an incident to farm operations. A committee amendment proposes to strike out the word "ordinarily" before "performed." A committee amendment proposes to make it clear that independent contractors and their employees engaged in transporting farm products from farm to market are not persons employed in agriculture.

The Rules Committee of the House refused to grant a rule permitting consideration of the Bill necessitating its abandonment during the First Session of the Seventy-fifth Congress.

On December 13, 1937, the Rules Committee was discharged from further consideration of the Bill by petition of the membership of the House.

Mrs. Norton, chairman of the House Committee on Labor, offered an amendment in the nature of a substitute for the Bill (82 Cong. Rec., December 15, 1937, p. 1572). The definition of agriculture in the proposed substitute was identical with the definition in the Bill as passed by the Senate with the amendments proposed by the House Committee on Labor. The amendment contained all the other provisions relating to agriculture in the Bill as passed by the Senate and proposed to be amended except those appearing in Section 4 (k) of the Senate Bill as reported to House (82 Cong. Rec., December 15, 1937, p. 1581).

Mr. Griswold also offered an amendment in the nature of a substitute containing substantially the same conditions as to agriculture as Mrs. Norton's. The Griswold amendment was rejected (82 Cong. Rec., December 15, 1937, p. 1604).

A series of amendments offered by Mr. Bland designed to exempt from both the wages and hours provisions of the Bill employees engaged in various processing of agricultural commodities were rejected (82 Cong. Rec., December 17, 1937, pp. 1776, 1777).

Likewise rejected was a proposed amendment including in the definition of agriculture operators of sawmills and manufacturers of lumber products employing not more than 25 persons (82 Cong. Rec., December 17, 1937, p. 1777).

An amendment offered by Mr. Kerr adding to the definition of "person employed in agriculture"

persons employed within the area of production and in the manufacture of packages or containers used in the shipment of fruit, fish, or vegetables was rejected (82 Cong. Rec., December 17, 1937, pp. 1777, 1778).

An amendment offered by Mr. Barden including in the definition of agriculture persons employed in connection with the selling of tobacco in auction warehouses was rejected (82 Cong. Rec., December 17, 1937, p. 1783).

Mr. Lea proposed an amendment substituting for the words "fresh fruits or vegetables" in the definition of persons employed in agriculture the words "fresh or dried fruits or vegetables, nuts or eggs" and inserting the word "dried" in the phrase "raw or natural state" (82 Cong. Rec., December 17, 1937, p. 1783).

A substitute amendment was offered by Mr. Lucas to Mr. Lea's amendment making the provisions of the definition applicable generally to "agricultural commodities" and adding after the expression "raw or natural state" the provision including persons employed by any cooperative association as defined in the Agricultural Marketing Act if the association is engaged in preparing, packing, or storing agricultural commodities in their raw or natural state.

Mr. Lucas explained his amendment in part as follows:

> Mr. LUCAS. In paragraph 7 of section 2 of this bill you will find a definition of "employees." Read along and in line 12 you will find the words "or any person employed in agriculture."

There is nothing further than that so far as the definition of people employed in agriculture is concerned until you arrive on page 8, subsection (20), where you have a definition of the term "persons employed in agriculture," which limits it to fresh fruits or vegetables, but you do not find in this bill at any other paragraph anything about who a person employed in agriculture is unless you refer back to section 2. This amendment merely provides that a "person employed in agriculture" shall include persons employed within the area of production engaged in preparing, packing, or storing agricultural commodities in the raw or natural state.

It broadens the definition and will adequately protect the farmers of my section. It exempts agriculture in all its branches and work incidental thereto, including the necessary handling and preparing for market commodities when performed by the farmer or by a farmers' owned and controlled cooperative. *It should be understood that it applies only to the employees in the area to be determined by the Administrator where the commodity is produced.* [Italics supplied.]

Mrs. NORTON. Mr. Chairman, I rise in opposition to this amendment. If this amendment is accepted it virtually kills the entire section, since it takes out of the bill everybody who has anything to do with agriculture.

Mr. MAVERICK. Mr. Chairman, will the gentlewoman yield?

Mrs. NORTON. I yield.

Mr. MAVERICK. I want to say that in my district there are pecan pickers or shellers who work for 3 to 5 cents an hour! Think

of it! If this amendment goes on these people are apparently without any protection whatever, and this bill will do them no good. So this amendment ought to be rejected.

Mrs. NORTON. The gentleman is exactly right. I have letters from a number of those workers, and if there is anything to help them, it is to kill this amendment.

Mr. MAVERICK. If there is anything to be done, it can be done in conference. The conference can iron out these points.

Mrs. NORTON. Exactly. I sincerely hope this amendment will be voted down.

Mr. LEA. Mr. Chairman, will the gentlewoman yield?

Mrs. NORTON. I yield.

Mr. LEA. I call attention to the fact that the amendment does not affect picking, to which the gentleman from Texas (Mr. Maverick) refers. It has nothing to do with picking. It simply relates to the preparation of the farmer's product for the market after the fruit has been picked.

Mr. MAVERICK. When I say "pick" it does not mean picking it off the tree. It means breaking it and taking the nut out of the shell. These people are industrial workers, not agricultural. They should be protected by the minimum-wage law.

The amendment was adopted (82 Cong. Rec., December 17, 1937, pp. 1783, 1784).

An amendment, offered by Mr. Pace substituting for the words "and growing" in the definition of agriculture the explanation "cultivation, growing and harvesting," was adopted (82 Cong. Rec., December 17, 1937, p. 2320). The amendment was explained merely as perfecting the definition

by making it clear that harvesting was to be an exempt operation (82 Cong. Rec., December 17, 1937, p. 1785).

An amendment offered by Mr. Whittington including in the definition of agriculture "any person employed in connection with the ginning of cotton" was rejected (82 Cong. Rec., December 17, 1937, pp. 1786, 1787).

On December 17, 1937, a motion to recommit to the Committee on Labor was adopted, a subcommittee of the House Committee on Labor was appointed to revise S. 2475 on March 1st, 1938. A confidential subcommittee print dated April 7, 1938, contained the following definition of agriculture (Section 2 (a) (7)):

> As used in this Act, the term "agriculture" includes farming in all its branches and, among other things, includes the cultivation and tillage of the soil, dairying, the cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, poultry, and any practices performed by a farmer or on a farm as an incident to such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. The term "person employed in agriculture" as used in this Act shall include persons employed within the area of production engaged in storing for the farmer, preparing (but not commercial processing), or packing agricultural or horticultural commodities in their raw, natural, or dried state, but shall not include employees of transportation contractors engaged in transporting farm products from farms to market.

The Committee on Labor rejected the subcommittee amendment and adopted a substitute for the Bill presented by Mrs. Norton. On April 21, 1938, another draft of S. 2475 was reported to the House as amendment in the nature of a substitute for S. 2475 (75th Congress, First Session, H. R. Report No. 2182). As reported, the Bill contained the following provisions relating to agriculture:

> Section 3 (f) contained the following definition of agriculture: "Agriculture includes farming in all its branches and, among other things, includes the cultivation and tillage of the soil, dairying, the cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, foxes, or poultry, and any practices performed by a farmer or on a farm as an incident to such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."
>
> Section 3 (g) defined employee employed in agriculture as follows: "Employee employed in agriculture" includes individuals employed within the area of production engaged in storing for the farmer, preparing (but not commercial processing), or packing agricultural or horticultural commodities in their raw, natural, or dried state, but does not include employees of transportation contractors engaged in transportation of farm products from farm to market.
>
> Section 11 provided that the provisions of Sections 4 and 5 relating respectively to minimum wages and maximum hours, shall not apply to any air-transport employee subject to the provisions of title II of the Railway Labor Act; or (5) any employee

employed in the taking of fish, sea foods, or sponges; or (6) any employee employed in agriculture;

(7) any employee to the extent that such employee is exempted by regulations or orders of the Secretary issued under section 12.

Section 11 (c) provided that the "provisions of section 10 shall not apply to any employee employed in agriculture."

The report accompanying the Bill contained the following comment:

> Agriculture is defined to include farming in all its branches, and among other things to include the cultivation and tillage of the soil, dairying, the cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, foxes, or poultry, and any practices performed by a farmer or on a farm as an incident to such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.
>
> "Employee employed in agriculture" is defined to include individuals employed within the area of production engaged in storing for the farmer, preparing (but not commercial processing), or packing agricultural or horticultural commodities in their raw, natural, or dried state. It does not include employees of transportation contractors engaged in transportation of farm products from farm to market. The definitions of "agriculture" and "employee employed in agriculture" are important in connection with the exclusion of employees in agriculture from all the provisions of the committee amendment.

The Rules Committee was discharged from further consideration of the Bill on May 23, 1938, and the Bill was adopted in the House on May 24, 1938.

Congressman Biermann, on May 23, 1938, announced that he would propose an amendment designed to remove the hardship that the Bill in its present form "imposes on farmers." He stated:

> The Bill, as presently worded, imposes hardships on the farmers, which in no way serve the purpose of the Bill. In section 2 the purpose of the Bill is declared to be to remedy "substandard labor conditions." Nobody complains of substandard labor conditions in the creameries, cheese factories, and similar institutions in the farming areas. As Charles W. Holman, secretary of The National Cooperative Milk Producers' Federation, says:
>
> "Persons employed in agricultural processing plants in country districts are well paid and are envied persons in their community. Farm labor and, indeed, many farmers themselves would be happy to change places with those persons, fortunate enough to be employed in creameries, cheese factories, and country milk plants."
>
> Tomorrow I shall offer the following amendment, which I hope the committee will accept:
>
> "Strike out subsection (g) of section 3 and insert in lieu thereof: '(g) "Employees engaged in agriculture" includes individuals employed within the area of production engaged in the handling, packing, storing, ginning, compressing, processing, pasteurizing, drying, or otherwise preparing agricultural commodities for market.'"

> Nearly every large farm organization in the United States has endorsed this amendment. I know of none that opposes it. It is a well-known fact that most of the cost—in most cases all of it—of running these farm factories is taken out of the amount the farmer receives for his product (83 Cong. Rec., May 23, 1938, pp. 7325, 7326).

On May 24, 1938, Congressman Biermann stated his amendment has been modified by omitting the term "processing" and including within the definition of employees engaged in agriculture, "individuals employed within the area of production, engaged in the handling, packing, storing, ginning, compressing, pasteurizing, drying, or canning of farm products and in making cheese and butter."

The debate on the amendment followed:

> Mr. BIERMANN. This bill is aimed at substandard labor conditions, and I submit that any Member of this House who is familiar with the kind of institution that this amendment I have offered is aimed at will agree with me when I say that substandard labor conditions do not exist in these institutions. In an amendment I inserted in the Record yesterday I included the word "processing." I call attention to the fact that in the pending amendment this word is stricken out. I struck it out for the reason that some Members thought that processing would include the making of cotton and wool into textiles, and rubber into finished products, and a long list of things of that kind. The amendment I have offered includes only the first processing of things that come off the farm. The important point is that the farmer pays

the bill for this processing. Those of us who come from dairy sections know that the cost of making butterfat into butter or milk into cheese is borne by the farmer. There is no contention about that; no argument. The Members from the South will agree that the man who raises the cotton pays for ginning the cotton.

When the cost of making butter, when the cost of making cheese, when the cost of ginning cotton increases, the farmer gets just so much less; and our contention and the contention of the farm organizations is that this bill designed to help labor should not be so worded that it puts another burden on the agriculture of this country.

Mr. COFFEE of Nebraska. This amendment would not take care of those employed in the handling of these seasonal crops outside of the area of production, would it?

Mr. BIERMANN. No.

Mr. COFFEE of Nebraska. In other words, the Orange amendment and the gentleman's amendment are not in conflict?

Mr. BIERMANN. No; they do not conflict.

Mr. THOMPSON of Illinois. May I ask the gentleman from Iowa whether his amendment would apply to a packing house located in Iowa and Illinois in the area of production, which employs two or three hundred men?

Mr. BIERMANN. Speaking frankly, I think that is something that would have to be worked out. There are some packing houses in the State of Iowa that this amendment would apply to perhaps; but may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town.

Mr. WHITTINGTON. With respect to the question propounded by the gentleman from Illinois, may I remind the gentleman from Iowa that the word "packers" occurs in the present Bill, so there is no difference between the amendment proposed and the provisions of the Bill under consideration. As I understand the gentleman's amendment, it is merely a clarification of the definition of the word "employee" under the terms of the Act.

Mr. BIERMANN. And it is the kind of clarification the farm organizations want. The question to be decided in voting on this amendment is whether or not the farms of the United States are going to have their definition of "employee" as applied to agriculture or whether it is going to be written by people who have a city viewpoint. I do not find fault with the Committee on Labor, but I think whereas they are the experts who have knowledge regarding the big factories in Jersey City, New York City, and some of the other large cities, by the same token we who come from the farm areas are best qualified to say what terms should apply to labor in those areas. I may say that not a single employee in any one of these factories has made an objection to this, so far as I know.

Mr. WHITTINGTON. It is simply to permit the farmer to get his material prepared for market.

Mr. BIERMANN. I want to read a couple of sentences from a letter I received this morning from Edward A. O'Neal, president of the Farm Bureau Federation, in which he sets out the desirability of writing into this Bill definitions such as proposed in my amendment. He states:

"We believe the bill should be clarified so as to assure the exemption of employees in such agriculture and horticulture industries in rural areas."

That is all my amendment takes in. He states further as follows:

"Failure to exempt these operations when performed in rural areas where conditions are so greatly different from the situation in large industrial and urban centers, will result in increased costs of processing and handling these products which will be reflected back in lower prices paid to farmers."

Mr. CRAWFORD. Does the gentleman's amendment exempt manufacturers of sugar beats in the rural areas?

Mr. BIERMANN. That is something that the Secretary will have to determine.

Mr. REILLY. Does the gentleman's amendment cover a pea'-canning set-up that is situated away from the farm on which the pears are grown?

Mr. BIERMANN. In a little town?

Mr. REILLY. In a little town; yes.

Mr. BIERMANN. But in the farm area?

Mr. REILLY. Yes.

Mr. BIERMANN. Yes; it does.

Mr. WADSWORTH. Let us look for a moment at the business of canning in a country canning factory. There are many of them in my district. I live within a mile of one and within 4 miles of another, and not to expose unduly any secret or make a remark of any particular importance, I sell sweet corn and peas to both of them.

The canning season starts in western New York, for example, first with early green peas around the first week or 10 days of June. The canning of peas goes on

until the middle of July or toward the end of July, with the later varieties winding up the season. Then there is an off season of 10 days or 2 weeks before sweet corn comes in. The sweet corn canning season lasts clear through August and nearly all of September. It is followed in turn by tomatoes, carrots, and beets and spinach.

Now, all during that period that factory has to work very irregular hours. Just like the farmer, it is the slave of the sun and the weather. If we have about 2 days of unduly hot weather the heat suddenly ripens the crop more rapidly than the canning factory or the farmers have calculated. The result is it has to be rushed into the factory with all possible speed in order that it may be canned in proper condition. While that is being done, which generally is not over once or twice in 10 days, the people in the factory work overtime. They probably do not work overtime more than once in a week or 10 days and seldom more than 2 or 3 hours of overtime.

This is a recognized custom in the trade. No one ever complains against it. The labor conditions are excellent, the whole thing is seasonal, and it is largely extra money to the operatives who get several weeks' work through the summer.

If that country canning factory is not exempt from the provisions of this bill, then all of its wage-and-hour limitations will be placed upon it, as well as the overtime provision, and when you increase the cost of processing fresh vegetables, you must expect one of two results. First, the factory must raise its price to the consumer—and I happen to know that they run on an exceedingly narrow margin—or

else reduce the price paid to the farmer, and that is always what is done. Whenever you increase arbitrarily the cost of processing these fresh vegetables the farmer gets less per ton for them. I have been through it myself.

Mr. GILCHRIST. The amendment provides that out in the open country, where the handling, packing, or storing of agricultural commodities is done, there shall be certain exemptions from the provisions of the bill. We should have such exemptions so as to apply them to our creameries and milk producers and cheese makers. Do not destroy these farm activities. There is no question of health involved in what is done out in the open country, because the conditions there are healthful. The tempo of work out there is slower than in cities.

There is no question involved as to the necessity for this amendment in the cities, and I would like to be for the bill if I can be. I deny the insinuation the gentleman from the city of Brooklyn made that we are trying to sabotage this bill. That gentleman has no interest in farms or farming. As was said by another, "There has not been a calf born in his district for 50 years." It is not the purpose to sabotage the bill, but if we do support the bill, it will be because it does not destroy our industries. The old bill provided for the things contained in this amendment. Why the change? The present bill takes care of the packing of apples, peaches, and pears, but it does not provide for such things as the canning of corn, the canning of tomatoes, or any of the other industries that the little villages depend upon and

must depend upon. You folks are going to deny them that right if you vote down this amendment. I know what is in the substitute amendment which has been talked about here. It is merely a red herring drawn across the train. The 10 weeks spoken of in the committee substitute will not do. It will not rescue us from the situation that you are putting on us. It does not provide for the things that my colleague from Iowa has provided in his amendment.

Mr. THOMPSON of Illinois. The amendment offered by the gentleman from Iowa, as well as section (g) of the committee amendment, is, in my opinion, entirely too far-reaching. I have no objection to exempting some of the small processors who do home curing and home canning from the provisions of this measure; but may I call the Committee's attention to the fact that in a large number of the smaller cities of our country, especially in the Middle West, there are many so-called small packing houses and canning plants. They are not so small after all. They employ two, three, or four hundred men and women and process various agricultural products. They kill pork, beef, lamb, and send it to the market, as well as can soups, vegetables, and fruits.

The canning plants in these small country towns do not do such canning for home consumption. They do it under contract for some of the large distributors of the country. The distributors from the large cities send out labels, and the commodities are then labeled and sent into interstate commerce to be consumed in the larger cities, and centers of population.

I think all will agree with me that these small canning plants and so-called small packing houses very frequently pay notoriously low wages and work their employees long hours during the season. If we are going to have constructive wage-and-hour legislation, we should protect the people in the small communities, the people in these one-industry towns and villages, who are obliged to work in these factories, there being no other employment available. I hope, therefore, the Committee will reject the amendment offered by the gentleman from Iowa.

Mr. Chairman, in this connection, and assuming that the committee will reject the Biermann amendment, I ask the chairman of the Committee on Labor, the gentlewoman from New Jersey, what is meant by the committee language in section (g) "but not commercial processing?" That is not clear in my mind and I would like to have a better idea of the committee's interpretation of that language which is in parentheses.

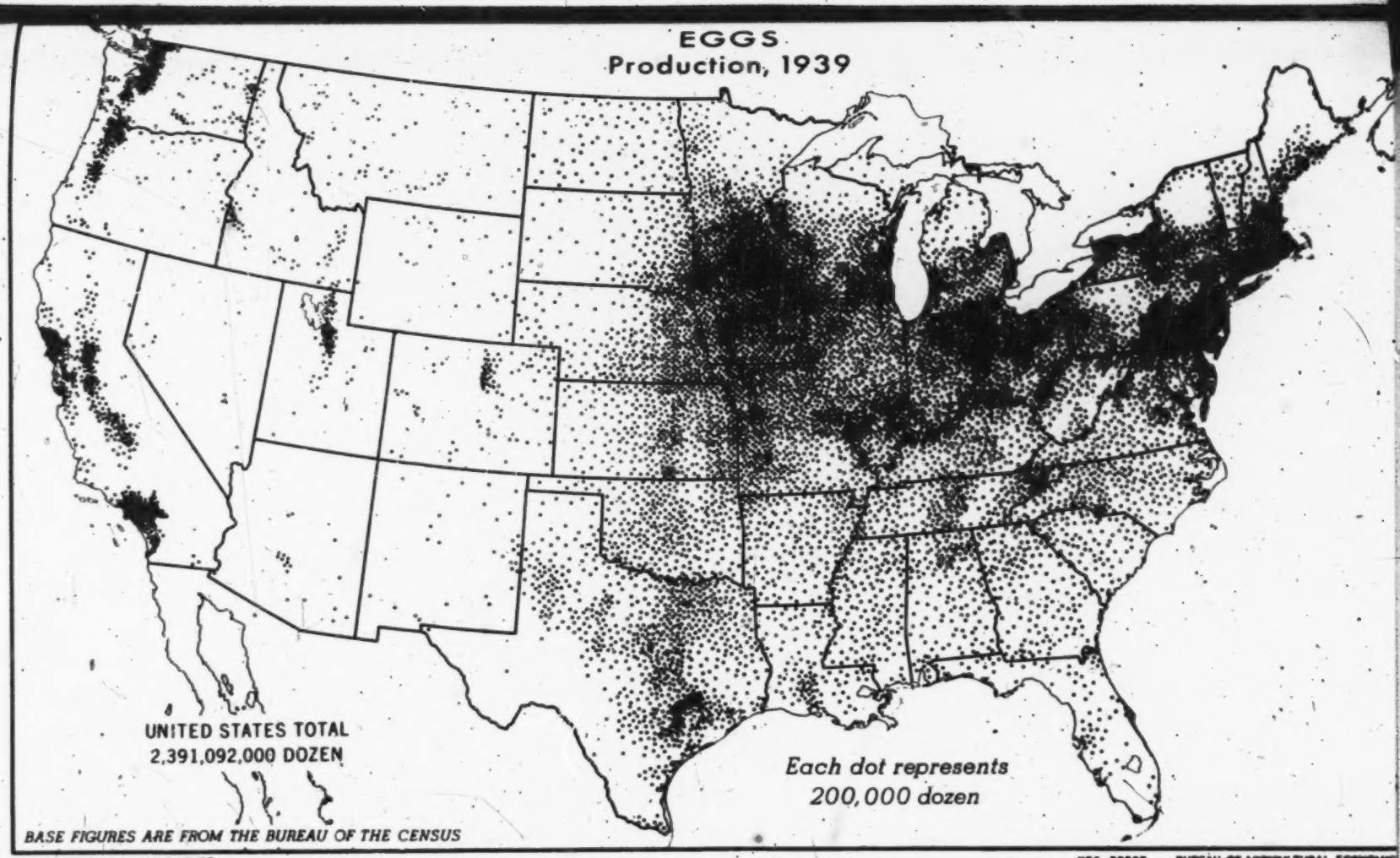
Mrs. NORTON. I may say to the gentleman it does not include making fertilizer or any of those commercially processed articles.

Mr. THOMPSON of Illinois. May I ask the gentlewoman this question: Where there is a small packing house or small canning plant engaged in packing or in canning, what do they do with the commodity? What do they do with the pork and beef they kill? What do they do with the vegetables they can? It must be for commercial consumption. They cannot eat it all themselves, and generally speaking, these plants are not cooperatives.

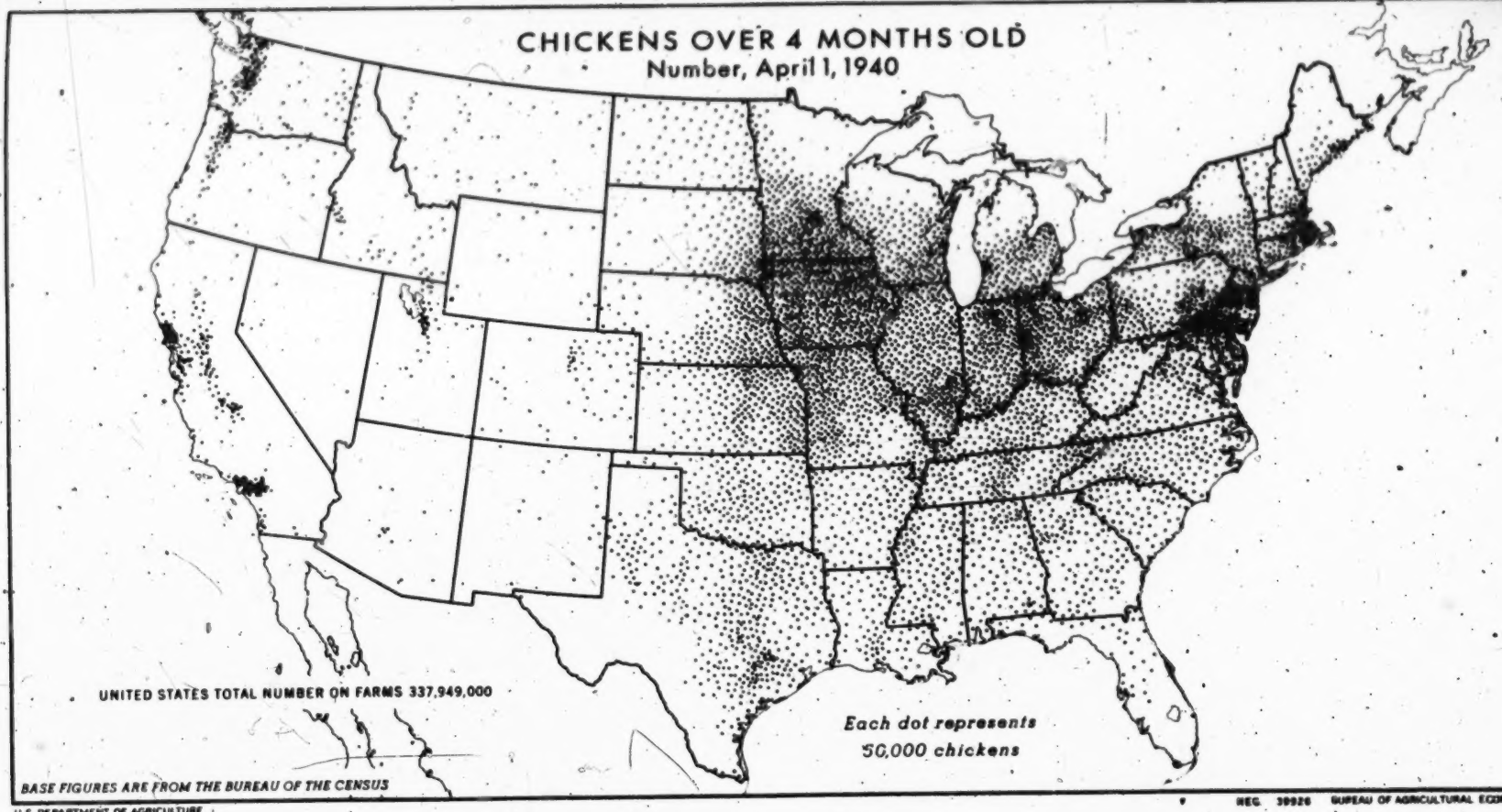
Mrs. NORTON. I may say that at the proper time I intend to offer an amendment which I think will take care of the small packing industries (83 Cong. Rec., May 25, 1938, pp. 7401, 7402, 7403, 7405, 7406.

The Biermann amendment was adopted by a vote of 159 to 134 (83 Cong. Rec., May 25, 1938, pp. 7407, 7408).

U. S. GOVERNMENT PRINTING OFFICE: 1944



U.S. DEPARTMENT OF AGRICULTURE
NEG. 39367 BUREAU OF AGRICULTURAL ECONOMICS



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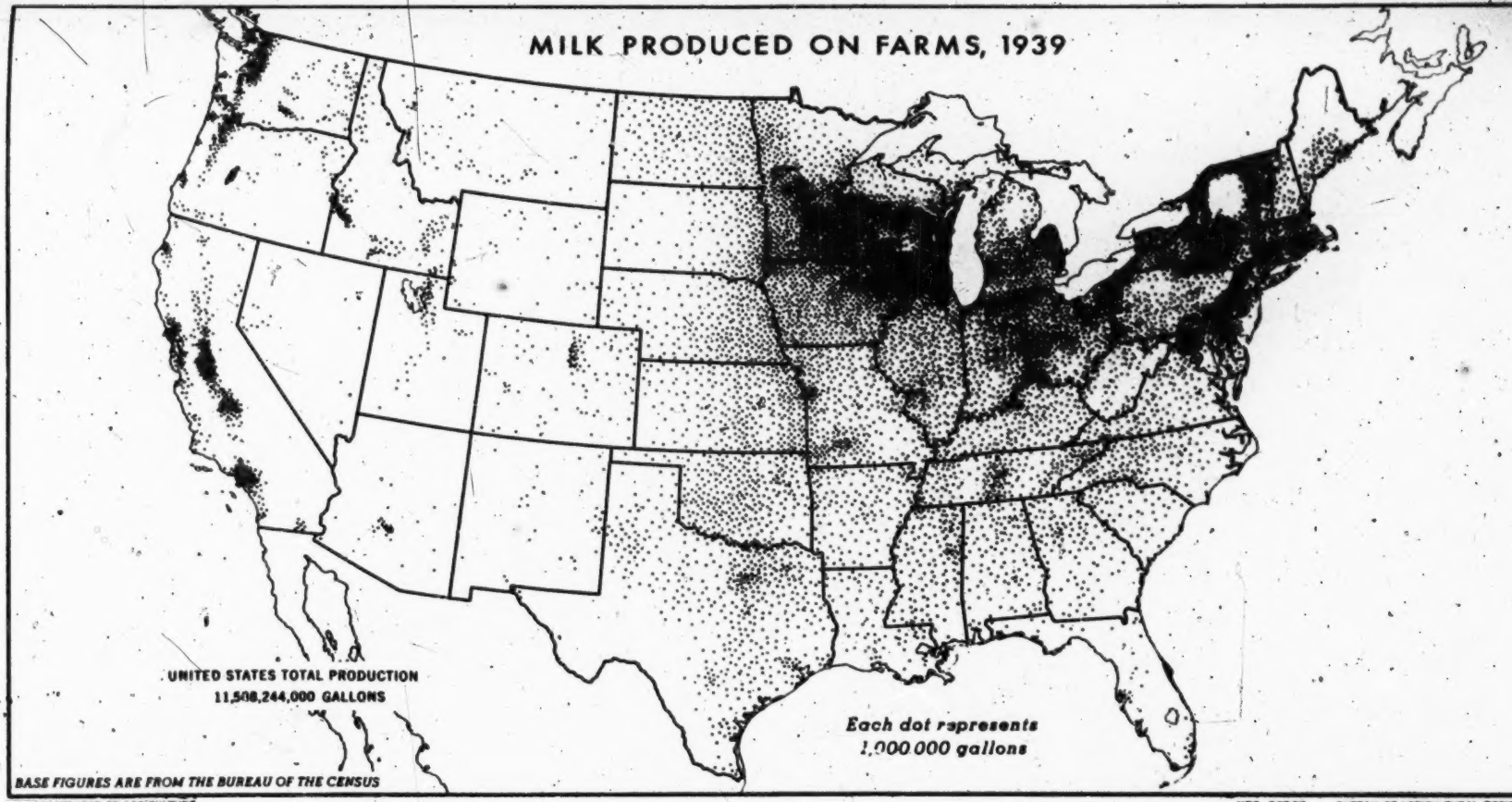
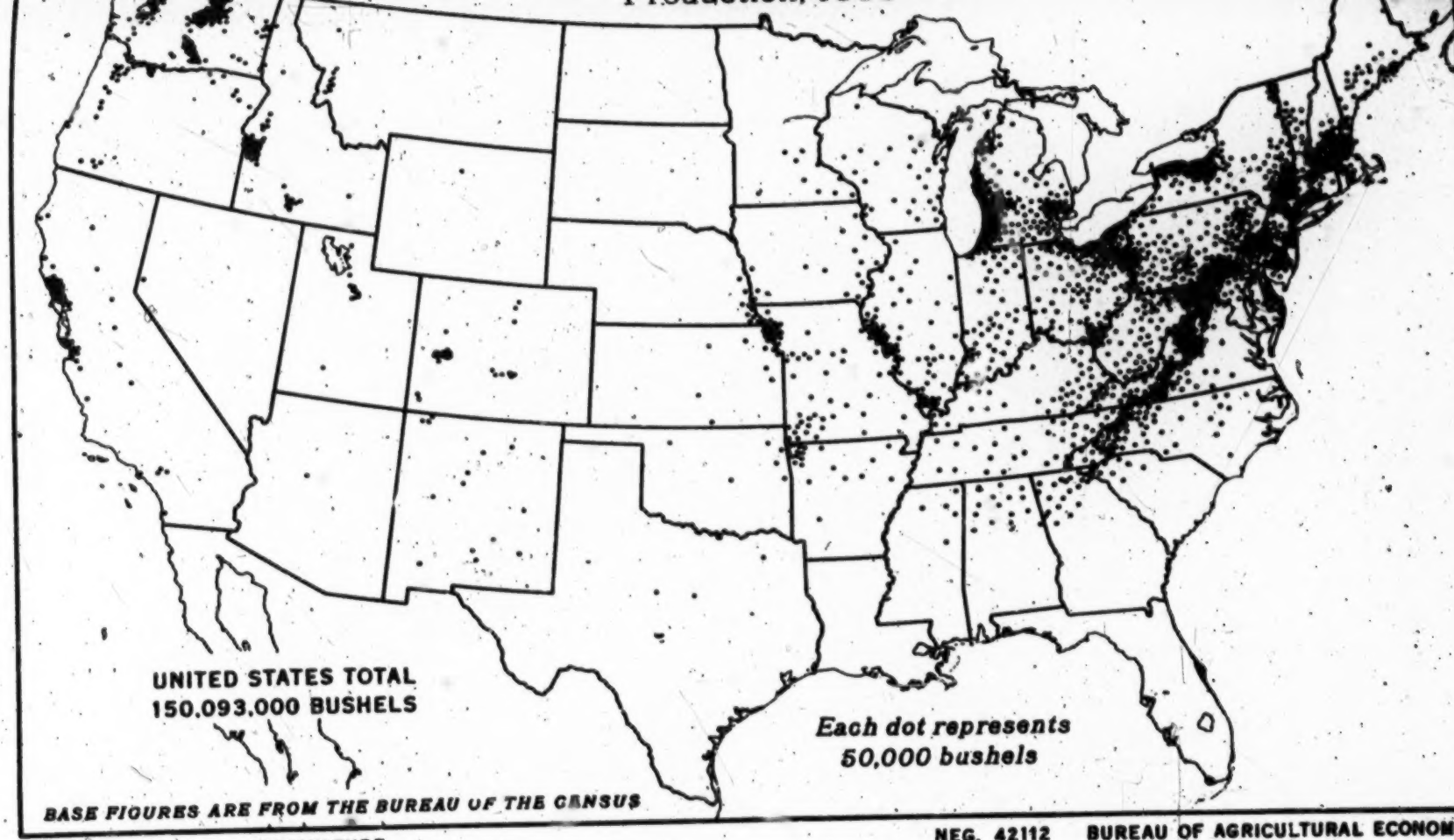

MILK PRODUCED ON FARMS, 1939
UNITED STATES TOTAL PRODUCTION
11,508,244,000 GALLONS
Each dot represents
1,000 000 gallons
BASE FIGURES ARE FROM THE BUREAU OF THE CENSUS
U.S. DEPARTMENT OF AGRICULTURE



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U. S. DEPARTMENT OF AGRICULTURE

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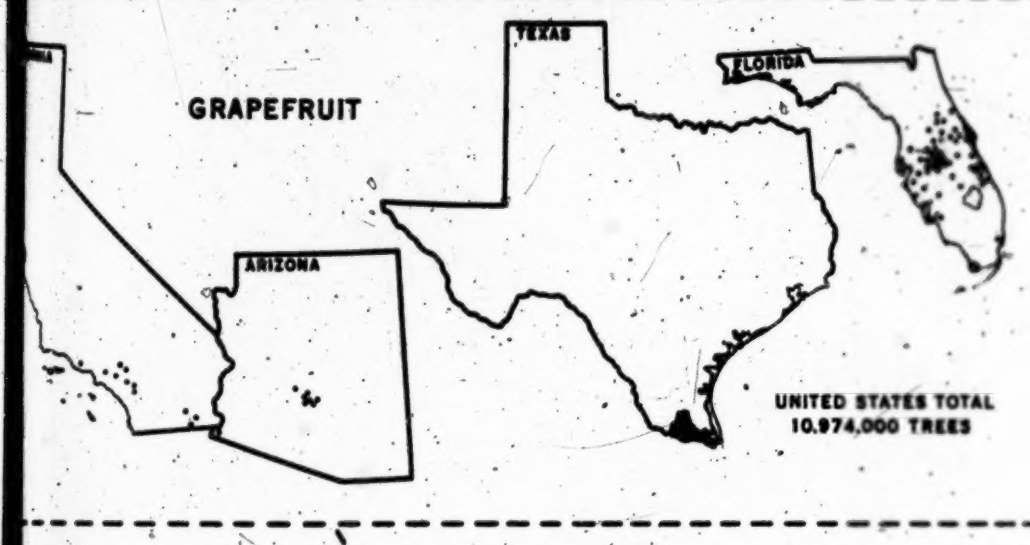
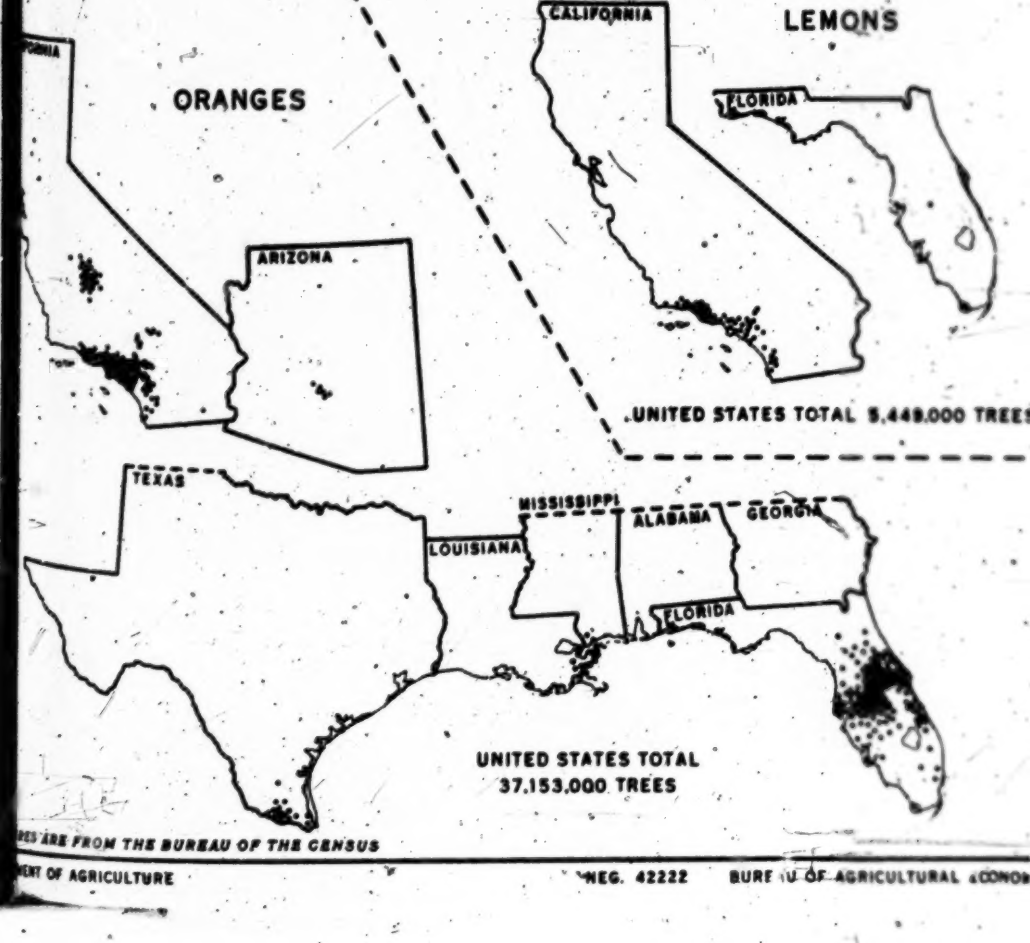
ORANGES, GRAPEFRUIT, AND LEMONS

Number of Trees, April 1, 1940

Each dot represents 100,000 trees





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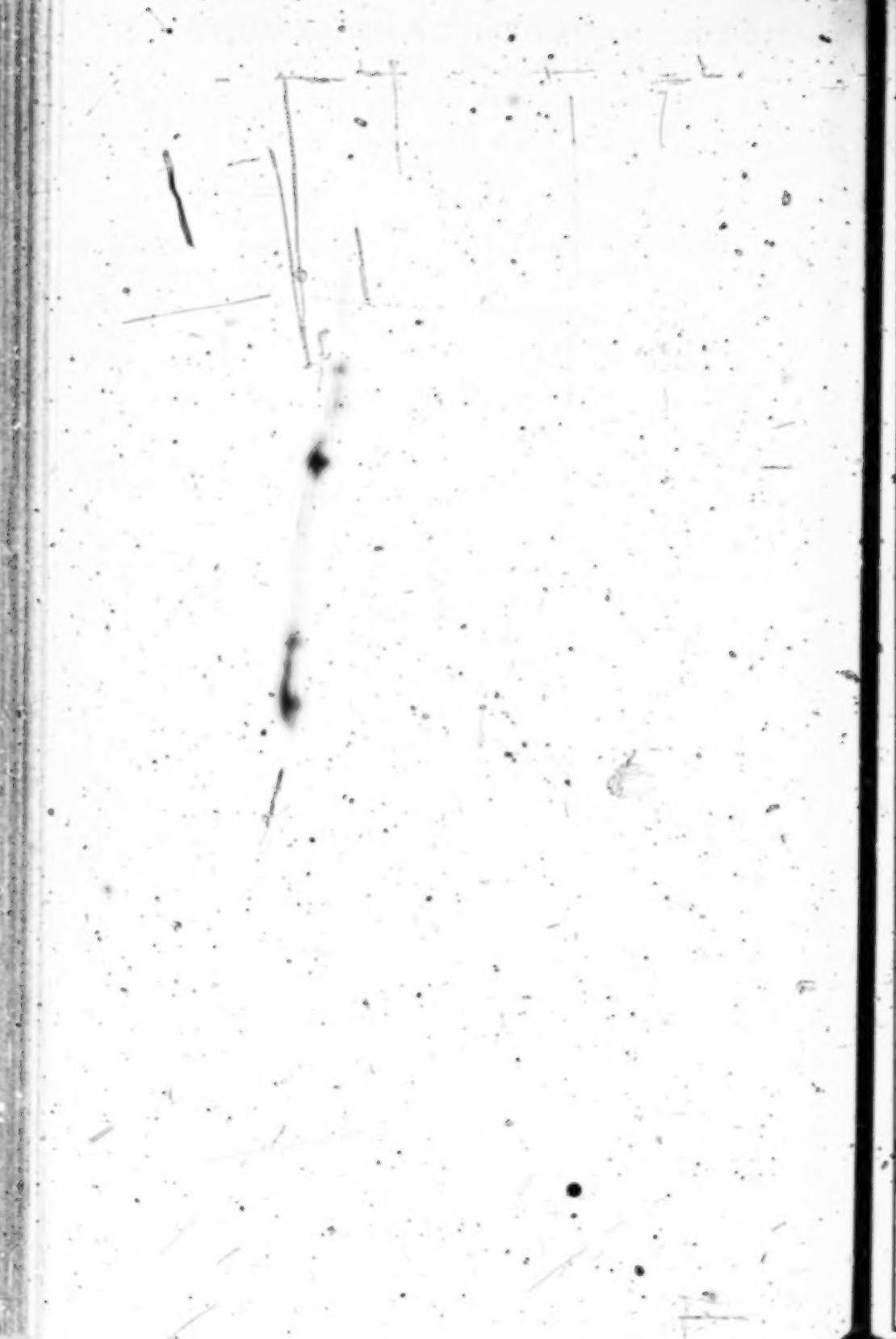
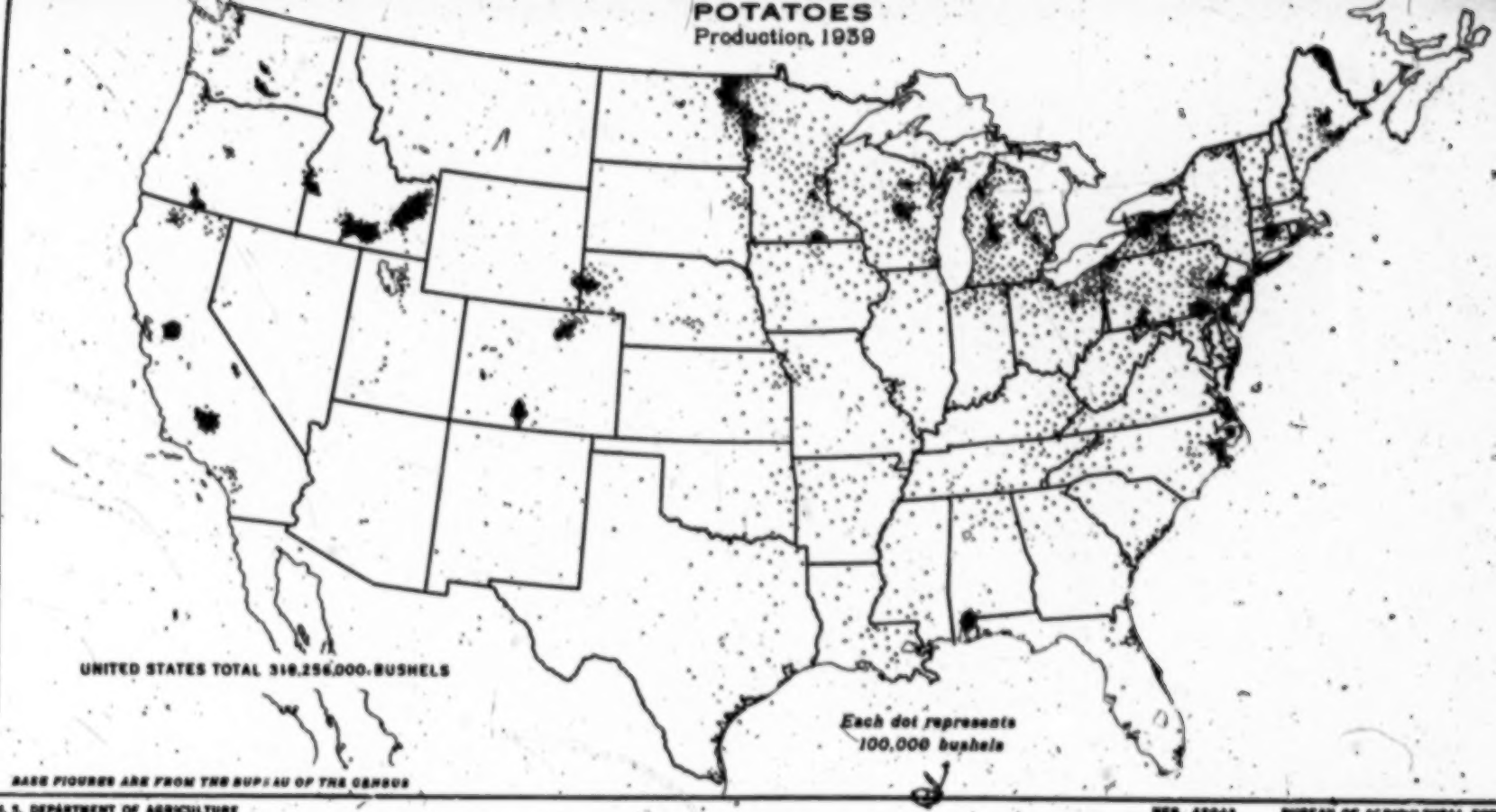
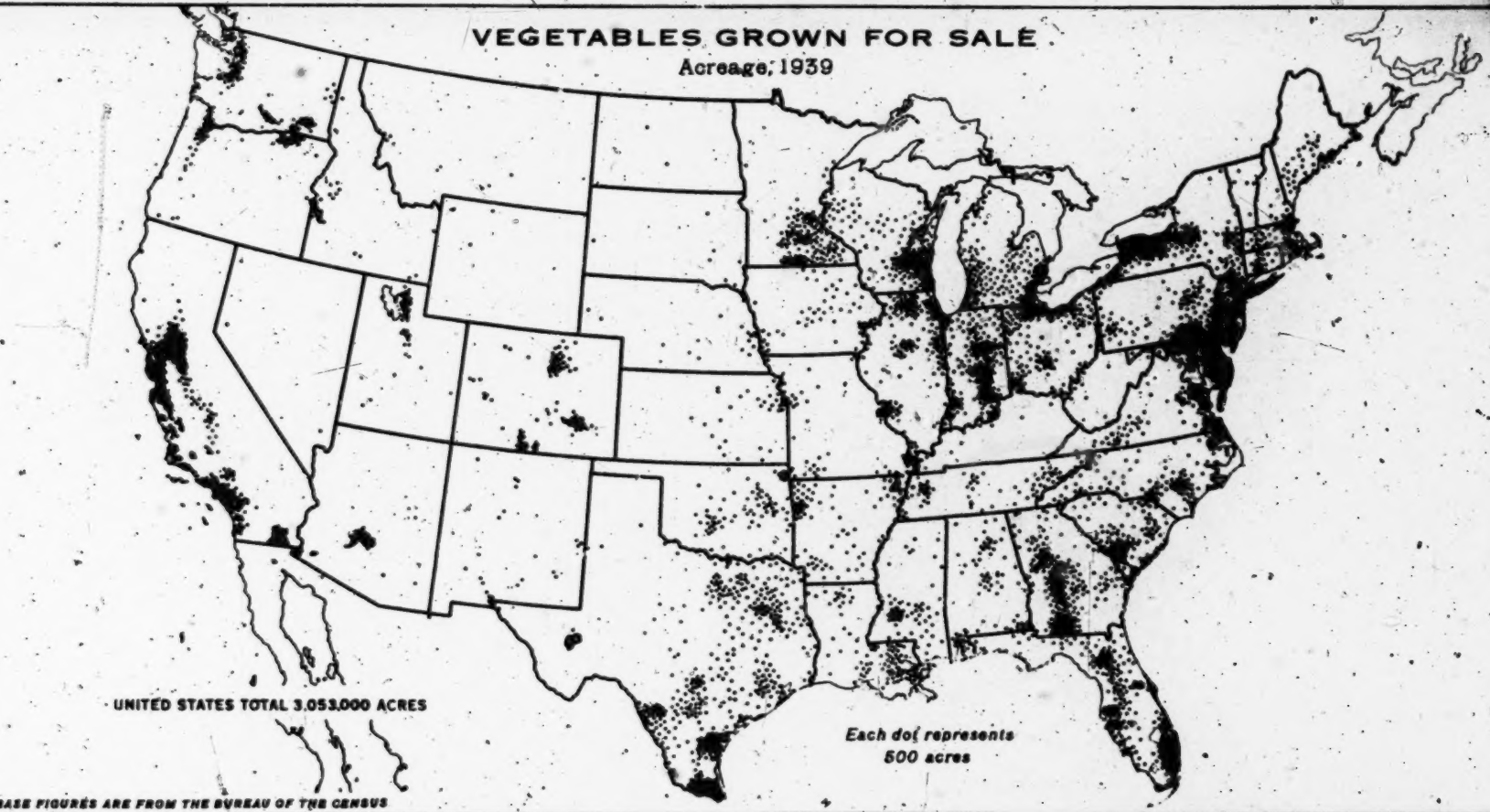



POTATOES
Production, 1939
UNITED STATES TOTAL 318,256,000 BUSHELS
Each dot represents
100,000 bushels
BASE FIGURES ARE FROM THE BUREAU OF THE CENSUS
U. S. DEPARTMENT OF AGRICULTURE
NEG. 42044
BUREAU OF AGRICULTURAL ECO

VEGETABLES GROWN FOR SALE

Acreage, 1939



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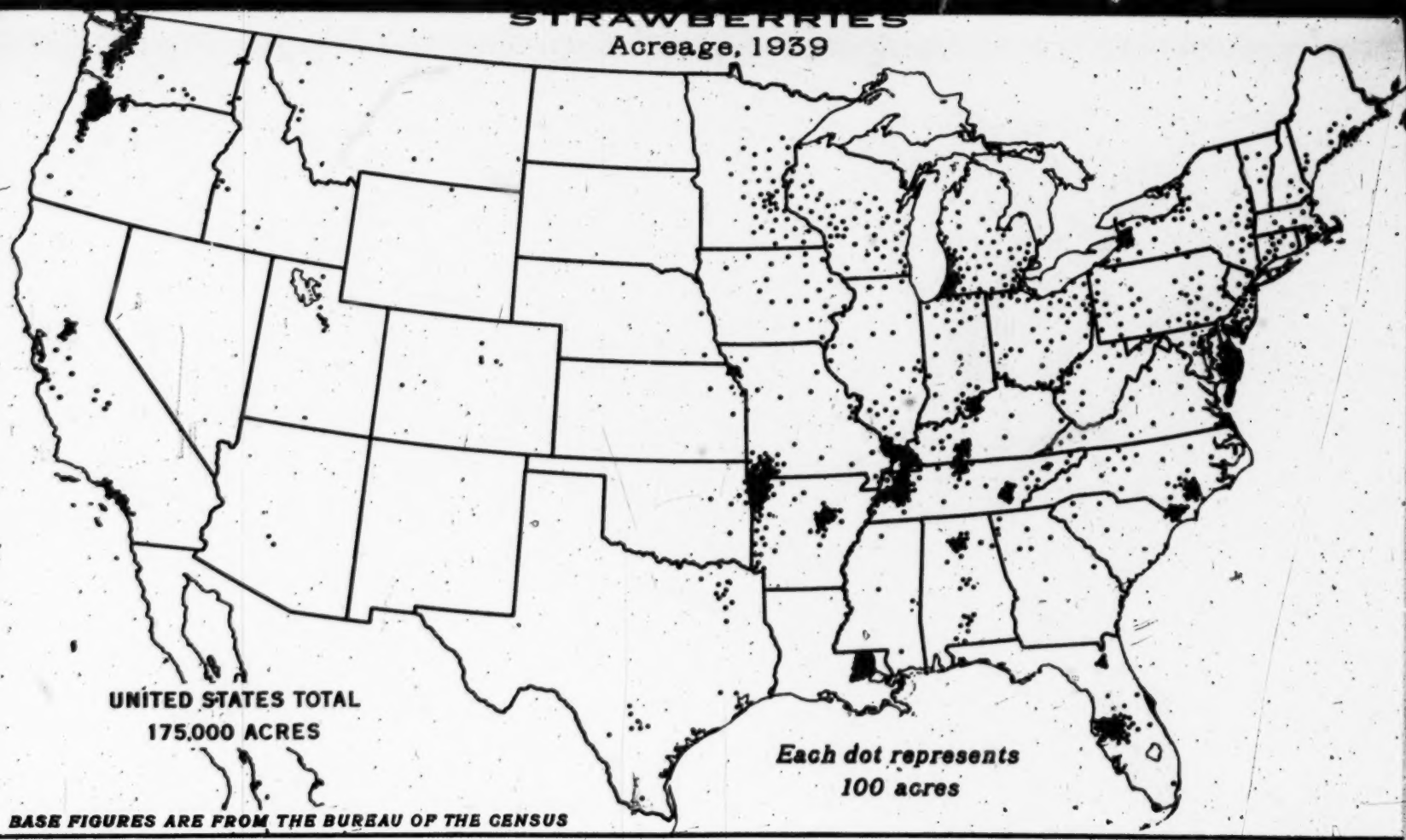
STRAWBERRIES

Acreage, 1939



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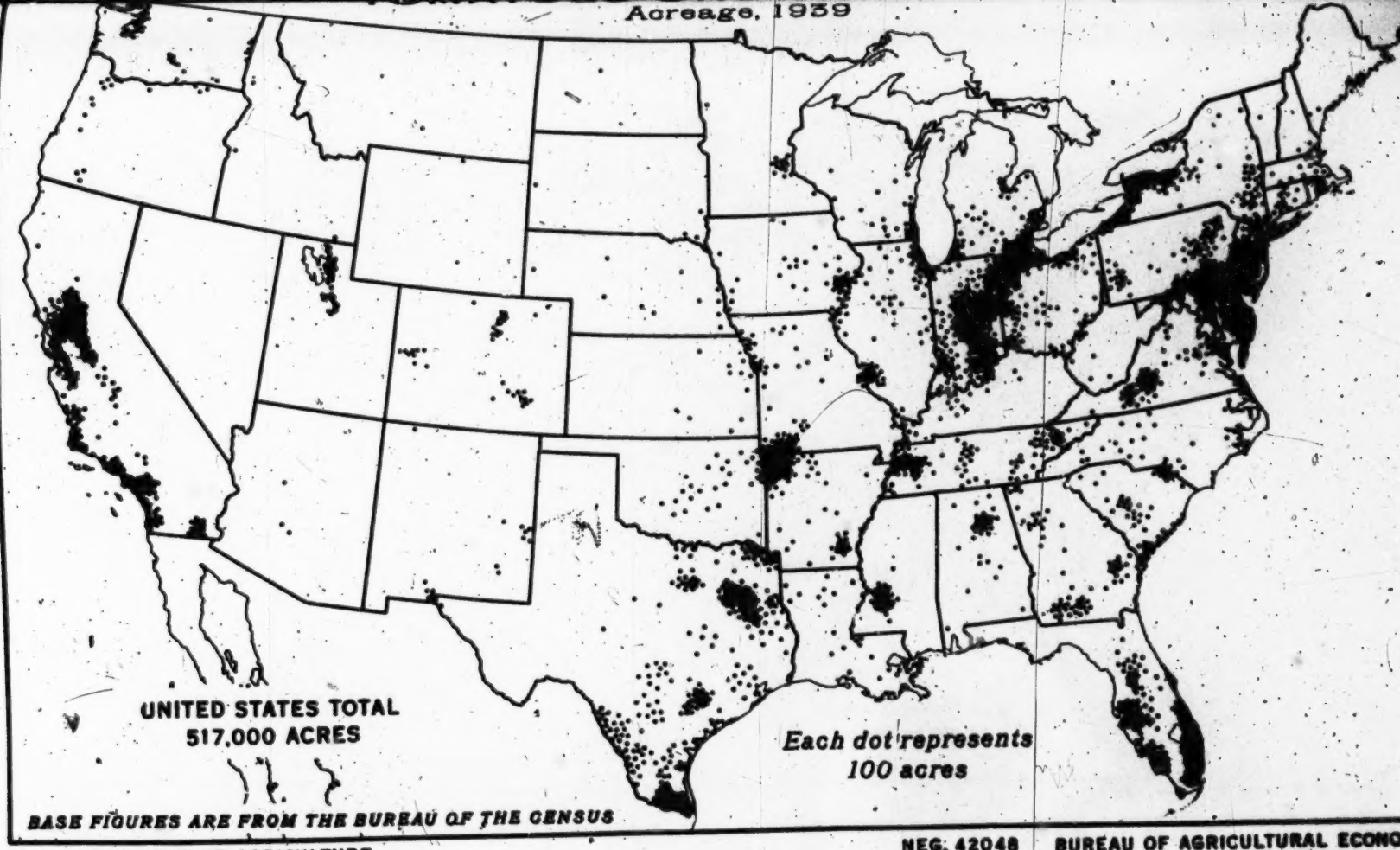

U. S. DEPARTMENT OF AGRICULTURE

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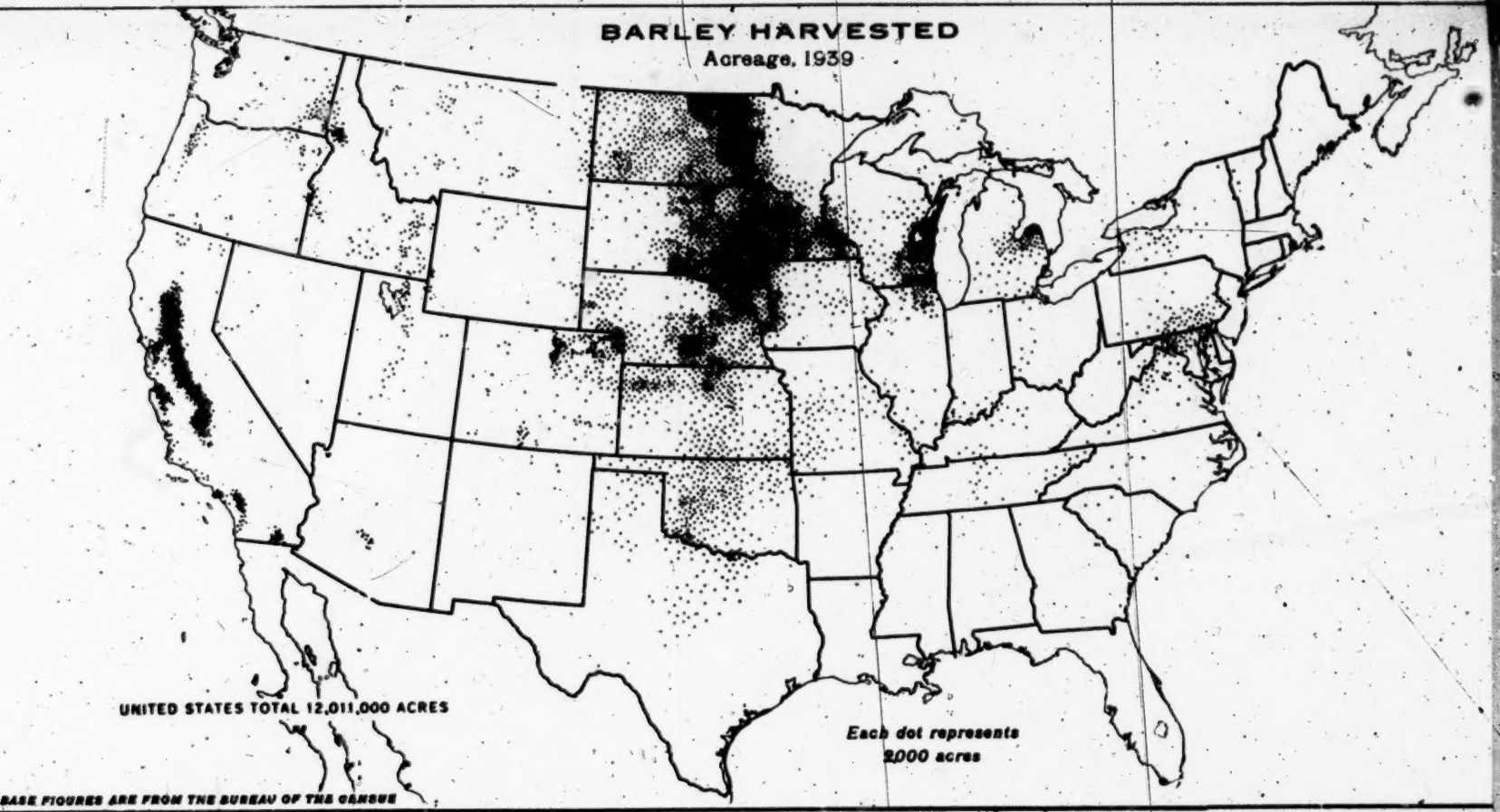
BARLEY HARVESTED

Acreage, 1939



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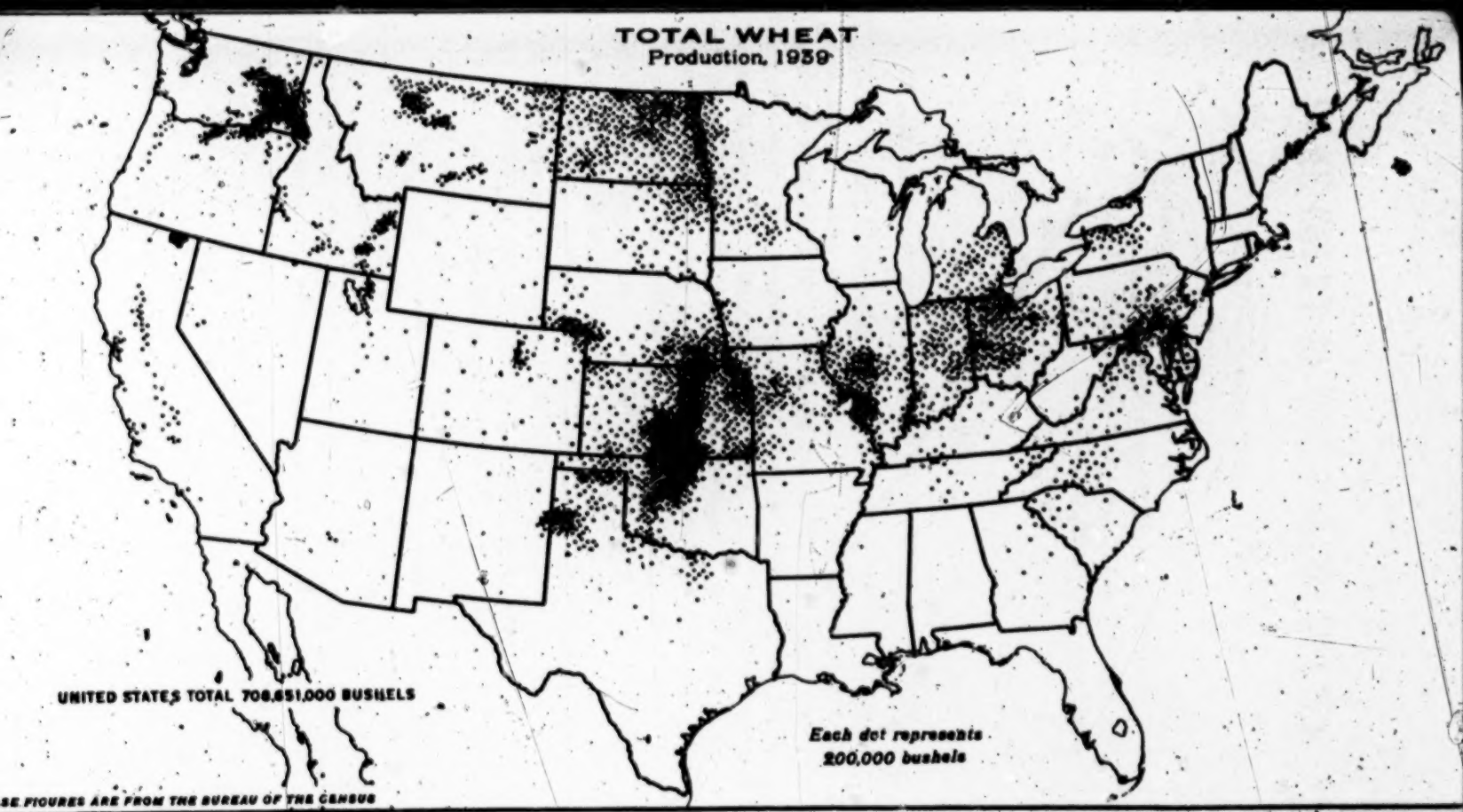
U. S. DEPARTMENT OF AGRICULTURE

NEG. 39750 BUREAU OF AGRICULTURAL ECONO


TOTAL WHEAT
Production, 1939
UNITED STATES TOTAL 708,651,000 BUSHELS
Each dot represents
200,000 bushels
SE FIGURES ARE FROM THE BUREAU OF THE CENSUS
DEPARTMENT OF AGRICULTURE
REG. 39978
BUREAU OF AGRICULTURAL ECO

SUPREME COURT OF THE UNITED STATES.

No. 217.—October Term, 1943.

Wilma E. Addison, Ernestine C. Lyles, Edgar Campbell, Sallie Baker and Luther Black, Petitioners,
vs.
Holly Hill Fruit Products, Inc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 5, 1944.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is a suit brought by employees of Holly Hill Fruit Products, Inc. for wage payments under the Fair Labor Standards Act. 52 Stat. 1060, 29 U. S. C. §§ 201 *et seq.* A judgment for the employees, the petitioners here, was reversed by the Circuit Court of Appeals, which held that Holly Hill's employees were by virtue of § 13(a)(10) of the Act exempted from its scope, in that they were "within the area of production (as defined by the Administrator), engaged in . . . canning of agricultural . . . commodities for market . . .". The court below reached this conclusion by holding that a portion of the definition of "area of production" made by the Administrator of the Wage and Hour Division was invalid and that the remaining portion afforded exemption. 136 F. 2d 323. We brought the case here, 320 U. S. 725, to settle a much litigated question of importance in the administration of the Fair Labor Standards Act.

Holly Hill, a citrus fruit cannery employing some two hundred workers, is located in Davenport, Florida, a town with a population of about 650 people. During the two seasons in controversy—November 14, 1938, to May 26, 1939, and November 16, 1939 to March 30, 1940—the Administrator promulgated three regulations based on the scope he gave to his authority under § 13(a)(10) to define "area of production". The validity of aspects of these regulations is the crucial issue.

By regulation of October 20, 1938, the Administrator defined "area of production" as used in § 13(a)(10) to include an indi-

vidual engaged in canning "if the agricultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediate locality and the number of employees in such establishment does not exceed seven". 29 Code Fed. Reg. (Supp. 1938) § 536.2(b). Effective April 20, 1939, an alternative definition, applicable to perishable or seasonal fresh fruits and vegetables, brought workers into the "area of production" if employed "in an establishment which is located in the open country or in a rural community and which obtains all of its products from farms in its immediate locality." It was provided that "'open country' or 'rural community' shall not include any city or town of 2,500 or greater population according to the 15th United States Census, 1930, and 'immediate locality' shall not include any distance of more than ten miles." 29 Code Fed. Reg. (Supp. 1939) § 536.2(e), pp. 2239-40. Finally, this alternative definition, no longer limited to fruits and vegetables, was in substance incorporated into the regulations effective June 17, 1939, but in addition it was provided that an individual might also be within the "area of production" "if he performs those [canning] operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven". 29 Code Fed. Reg. (Supp. 1939) § 536.2(a)(d), p. 2240.

Before coming to the main question, that of the validity of adding a limitation on the allowable number of employees in one canning establishment within the exempted geographic bounds, we shall dispose of the applicability of the Administrator's other exempting definitions to Holly Hill's employees.

The definitions which contain no employee limitation impose two essential conditions on an exemption sought under § 13(a)(10): the establishment must be located in a city of town having a population smaller than 2500,[1] and all of its products must be obtained from within ten miles of the establishment. Since Davenport contains less than 2500 persons, the first condition is met and we

[1] The fact that Davenport is within four miles of Haines City, with a population greater than 2500, led the district court to conclude that Holly Hill was not located in the "open country" or a "rural community". This appears to be a plain solecism. 29 Code Fed. Reg. (Supp. 1939) § 536.2(e), pp. 2239-40, and § 536.2(d), p. 2240.

need not pass on its validity.[2] As to the second condition, the only evidence introduced indicates that during the 1938-1939 season, about 2% of the fruit used came from beyond ten air miles of the plant, and that for the 1939-1940 season, about 3.75% came from groves more than ten air miles from Holly Hill. Since all of the fruit did not come from within ten miles, Holly Hill did not satisfy this condition of the Administrator's definitions. There can be no doubt that this conclusion is justified by a literal reading of the regulations, and the court below, in holding that the Administrator's requirement that all the goods come from within ten miles must be construed to mean "substantially all", entered the Administrator's domain. What was said in another connection is relevant here. "Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the [Administrator] must be accepted unless we can say that it is very wide of any reasonable mark." Mr. Justice Holmes, dissenting, in *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 41.[3]

We come then to the validity of the October 20, 1938, regulation and that of the alternative in the June 17, 1939, regulation which provide in substance that an individual is employed within the "area of production" if an establishment obtains the commodities from the "immediate locality" (1938) or all the materials come from the "general vicinity" (1939), and in addition the number of employees in the establishment "does not exceed seven". In short, when Congress exempted "any individual employed within the area of production (as defined by the Administrator)" (§ 13(a)(10)), did it authorize the Administrator not only to designate territorial bounds for purposes of exemption but also to except establishments from such exemption according to the number of workers employed.

Congress provided for eleven exemptions from the controlling provisions relating to minimum wages or maximum hours of the

[2] It is conceded that a specific ruling on the population criterion is unnecessary.

[3] Holly Hill here attacked the finding of the district court that all of the fruit did not come from within ten miles, but we see no reason to disturb it.

Fair Labor Standards Act.[4] Employment in agriculture is probably the most far-reaching exemption. Closely related to it is the exemption which is our immediate concern—those workers engaged in processes necessary for the marketing of agricultural products and employed "within the area of production" of such commodities. Such was the phrase and such its conjunction with the exemption for agriculture of which it formed an integral part as the bill passed both Houses, except that the enumerated exempted employments subsidiary to agriculture varied in the two bills.[5] The parenthetical qualification "(as defined by the Admin-

[4] "SEC. 13(a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or by-products thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations." 52 Stat. 1067, as amended, 53 Stat. 1266.

[5] The exemptions provided in § 13(a)(10) did not appear in the bill as reported to the Senate, but in the debate on the floor of that body an effort was made to extend the exemption accorded to agricultural workers, and as passed by the Senate the bill provided that "The term 'person employed in agriculture', as used in this act, insofar as it shall refer to fresh fruits and vegetables, shall include persons employed within the area of production engaged in preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state." 81 Cong. Rec. 7876, 7949, 7957. This provision, varied somewhat by extending its coverage to all "agricultural commodities" (82 Cong. Rec. 1783-1784), remained as part of the definition of "Employee employed in agriculture" (H. Rep. No. 2182, 75th Cong., 3d Sess., p. 2) until shortly before the bill was finally adopted by the House, at which time the so-called Biermann amendment included within the definition of employees engaged in

istrator)'' emerged from the conference committee of the two Houses.[6]

The textual meaning of ''area of production'' is thus reinforced by its context: ''area'' calls for delimitation of territory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near their production. The phrase is the most apt designation of a zone within which economic influences may be deemed to operate and outside of which they lose their force. In view, however, of the variety of agricultural conditions and industries throughout the country the bounds of these areas could not be defined by Congress itself. Neither was it deemed wise to leave such economic determination to the contingencies and inevitable diversities of litigation. And so Congress left the boundary-making to the experienced and informed judgment of the Administrator. Thereby Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter, that is the fixing of minimum wages and maximum hours.

In delimiting the area the Administrator may properly weigh and synthesize all such factors. So long as he does that and no more, judgment belongs to him and not to the courts. For Congress has cast upon him the authority and the duty to define the ''area of production'' of agricultural commodities with reference to which exemption in subsidiary employments may operate. But if Congress intended to allow the Administrator to discriminate between smaller and bigger establishments within the zone of agricultural production, Congress wholly failed to express its purpose. Where Congress wanted to make exemption depend on size, as it did in two or three instances not here relevant, it did

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agriculture ''individuals employed within the area of production, engaged in the handling, packing, storing, ginning, compressing, pasteurizing, drying, or canning of farm products and in making cheese and butter.'' 83 Cong. Rec. 7401, 7407. At the conference on the disagreeing votes of the two Houses, the ''area of production'' provision was given the form in which it was finally enacted, and there the parenthetical phrase ''as defined by the Administrator'' was inserted after ''area of production''. 83 Cong. Rec. 9249.

[6] Compare this provision with § 13(a)(1) exempting employees in ''a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator)''. For this class, the Administrator is given the authority to define and delimit the ''terms'' used. But in the same section, subdivision 10 grants authority to define not the term ''area'', but to define the ''area''.

so by appropriate language.[7] Congress referred to quantity when it desired to legislate on the basis of quantity.

Congressional purpose as manifested by text and context is not rendered doubtful by legislative history. Meagre as that is, it confirms what Congress has formally said. The only extrinsic light cast on Congressional purpose regarding "area of production" is that cast by the sponsors of this provision for enlarging the range of agricultural exemption. Senator Schwellenbach frankly stated that the largest apple packing plant in the world would be exempt if the "work done in that plant is as described in the amendment". 81 Cong. Rec. 7877. And in the House, Representative Biermann, while explaining his amendment in somewhat Delphic terms, did indicate plainly enough that he had in mind not differences between establishments within the same territory but between rural communities and urban centers: "may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town." 83 Cong. Rec. 7401.[8]

From such light as Congress gave us beyond its words, it would appear that in giving exemption to an "area of production", without differentiating as between establishments within such area, Congress might well have considered that a large plant within an area should not be given an advantage over small plants in competing for labor within the same locality, while at the same time it gave the Administrator ample power, in defining the area, to take due account of the appropriate economic factors in drawing the geographic lines. In any event, Congress did not leave it to the Administrator to decide whether within geographic bounds defined by him the Act further permits discrimination between establishment and establishment based upon the number of employees. The determination of the extent of authority given

[7] See §§ 13(a)(2)(8)(11) dealing respectively with retail or service establishments, weekly or semi-weekly newspapers and public telephone exchanges.

[8] Representative Biermann was asked whether his amendment "would apply to a packing house located in Iowa and Illinois in the area of production, which employs two or three hundred men". This was his complete answer: "Speaking frankly, I think that is something that would have to be worked out. There are some packing houses in the State of Iowa that this amendment would apply to perhaps; but may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town." Certainly Mr. Biermann did not give the remotest intimation that "area of production" was meant to convey any idea other than that which area usually conveys.

to a delegated agency by Congress is not left for the decision of him in whom authority is vested.

The wider a delegation is made by Congress to an administrative agency the more incomplete is a statute and the ampler the scope for filling in, as it is called, its details. But when Congress wants to give wide discretion it uses broad language. Thus, in the Interstate Commerce Act, Congress prohibited a lower rate for a longer than a shorter haul, but it gave an authority to the Interstate Commerce Commission, undefined except as the general purposes of that Act implied the basis for affording exemption, to grant relief from this prohibition. *Intermountain Rate Cases,* 234 U. S. 476. Again in the National Labor Relations Act, Congress gave the Board authority to take such action "as will effectuate the policies of this Act." § 10(c), 49 Stat. 449, 454, 29 U. S. C. § 160(c). The "policies" of the Act were so broadly defined by Congress that the determination of "the relation of remedy to policy is peculiarly a matter for administrative competence". *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194. In the Fair Labor Standards Act, Congress legislated very differently in relation to the problem before us. To be sure the Fair Labor Standards Act like the National Labor Relations Act was based on findings and a declaration of broad policy. But Congress did not prescribe or proscribe generally and then give broad discretion for administrative relief as in the Interstate Commerce Act or for remedies as in the National Labor Relations Act. Congress did otherwise. It dealt with exemptions in detail and with particularity, enumerating not less than eleven exempted classes based on different industries, on different occupations within the same industry, (the classification in some instances to be defined by the Administrator, in some made by Congress itself, in others subject to definition by other legislation), on size and on areas. In short the Administrator was not left at large. A new national policy was here formulated with exceptions, catalogued with particularity and not left within the broad dispensing power of the Administrator. Exemptions made in such detail preclude their enlargement by implication.

We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we

should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. For we are here not dealing with the broad terms of the Constitution "as a continuing instrument of government" but with part of a legislative code "subject to continuous revision with the changing course of events". *United States* v. *Classic*, 313 U. S. 299, 316.

Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. "The natural meaning of words cannot be displaced by reference to difficulties in administration." *Commonwealth* v. *Grunseit* (1943) 67 C. L. R. 58, 80. For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. The idea which is now sought to be read into the grant by Congress to the Administrator to define "the area of production" beyond the plain geographic implications of that phrase is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it. After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

The details with which the exemptions in this Act have been made preclude their enlargement by implication. While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid "that retrospective expansion of meaning which properly deserves the stigma of judicial legislation." *Kirschbaum Co. v. Walling*, 316 U. S. 517, 522. To blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation.

We agree therefore with the Circuit Court of Appeals in holding invalid the limitations as to the number of employees within a de-

fined area. But we cannot follow that Court in deleting this part of the administrative regulation and, by applying what remains of the definition, exempting Holly Hill's employees from the requirements of the Act. Since the provision as to the number of employees was not authorized, the entire definition of which that limitation was a part must fall. We can hardly assume that the Administrator would have defined "area of production" merely by deleting the employee provision, had he known of its invalidity. It would be the sheerest guesswork to believe that elimination of an important factor in the Administrator's equation would have left his equation unaffected even if he did not here insist upon its importance. It is not for us to write a definition. That is the Administrator's duty.

Concluding, then, that when Congress granted exemptions for workers within the "area of production (as defined by the Administrator)" it restricted the Administrator to the drawing of geographic lines, even though he may take into account all relevant economic factors in the choice of areas open to him, the regulations which made discriminations within the area defined by applying the exemption only to plants with less than seven employees are *ultra vires*. But that leaves the difficult problem of the proper disposition of the case. It is our view that the case should be remanded to the district court with instructions to hold it until the Administrator, by making a valid determination of the area with all deliberate speed, acts within the authority given him by Congress.

Such a disposition is most consonant with justice to all interests in retracing the erroneous course that has been taken. Neither law nor logic dictates an "either-or" conclusion—that is, a conclusion that the employment in these industries is entirely exempt because the Administrator misconceived the bounds of his regulatory powers although plainly enough he meant to exercise them so as not to withdraw all these employments from the requirements of the Act, or that employment in these industries is subject to the Act because no exception excludes it. The two opposing alternatives do violence to the law as Congress wrote it. To hold that all individuals "engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products" are

exempt from the operation of the Act is obviously to fly in the face of Congressional purpose. The Act exempts some but not all of the employees engaged in these industries, and it is not for us now to say that all are exempt. So to hold would postpone the operation of the Act in the enumerated instances for at least six years beyond the date fixed by Congress. Equally offending to the purposes of Congress and therefore to fairness in this situation is the suggestion that if the exemption falls all employees engaged in the designated industries are covered by the Act.

The accommodation that we are making assumes, what we must assume, that the Administrator will retrospectively act as conscientiously within the bounds of the power given him by Congress as he would have done initially had he limited himself to his authority. To be sure this will be a retrospective judgment, and law should avoid retroactivity as much as possible. But other possible dispositions likewise involve retroactivity, with the added mischief of producing a result contrary to the statutory design.

Such an adaptation of court procedure to a remolding of the situation as nearly as may be to what it should have been initially is not unprecedented. Such was essentially the procedure which was devised to unravel the skein in *United States* v. *Morgan*, 307 U. S. 183. The Court did not feel itself balked by the kind of considerations that seemed controlling to a Baron Parke. The creative analogies of the law were drawn upon by which great equity judges, exercising imaginative resourcefulness, have always escaped the imprisonment of reason and fairness within mechanical concepts of the common law. See, *e. g.*, *Atlantic Coast Line* v. *Florida*, 295 U. S. 301; *Inland Steel Co.* v. *United States*, 306 U. S. 153; and for some examples of this approach see *Graf* v. *Hope Building Corp.*, 254 N. Y. 1, 7 (Cardozo, Ch. J., dissenting). That such were the large considerations that guided decision in the *Morgan* case the opinion makes clear:

> " . . . in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain the end through co-

ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim." 307 U. S. at 191.

If it be said that in the *Morgan* case the Court was dealing with a fund in court—irrelevant though that be to the governing principles of that decision—no such constriction can be made of the import of our decision in *Tank Car Corp.* v. *Terminal Co.*, 308 U. S. 422. That like this was an action at law and not a suit in equity involving a *res*. The respondent was seeking to recover a sum admittedly due under a car-leasing agreement with petitioner. The Interstate Commerce Commission urged that since the Commission had not, as the law required, passed upon the validity of the practice involved in the agreement, the district court was without jurisdiction. And so, technically speaking, the district court was. But this Court remanded the case to the district court with instructions to hold the cause "pending the conclusion of an appropriate administrative proceeding." The petition for rehearing claimed that our decision involved retroactivity. 309 U. S. 694. So it did. But as against retroactivity we balanced the considerations that made retroactivity seem the lesser evil.

In short, the judicial process is not without the resources of flexibility in shaping its remedies, though courts from time to time fail to avail themselves of them. The interplay between law and equity in the evolution of more just results than the hardened common law afforded, has properly been drawn upon in working out accommodating relationships between the judiciary and administrative agencies. And certainly in specific cases, such as those already referred to and in this, it is consonant with judicial administration and fairness not to be balked by the undesirability of retroactive action any more than courts have found it difficult to sanction legislative ratification of acts originally unlawful, *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Tiaco* v. *Forbes*, 228 U. S. 549; *Graham & Foster* v. *Goodcell*, 282 U. S. 409; *Hirabayashi* v. *United States*, 320 U. S. 81, 91, or retroactively to give prior legislation new scope. *Paramino Co.* v. *Marshall*, 309 U. S. 370. And in *habeas corpus* proceedings, even though a

petitioner was unlawfully in custody, this Court has allowed continued retention of custody until a valid order could be made. *Mahler* v. *Eby*, 264 U. S. 32; *Tod* v. *Waldman*, 266 U. S. 113.

Finally, there is no difficulty upon such a remand in requiring the Administrator to promulgate his definition. This Court has on several occasions required the Interstate Commerce Commission to take jurisdiction when it declined to do so or to discharge a duty laid upon the Commission by statute. *Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474; *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638. See also *Kansas City So. Ry.* v. *Interstate Commerce Commission*, 252 U. S. 178. The district court would not be telling the Administrator how to exercise his discretion but would merely require him to exercise it. It is a remedy against inaction.

Holly Hill also contended that if it is not entirely exempt from paying the overtime rates here awarded, it is entitled to the advantage of the partial seasonal exemptions afforded by §§ 7(b)(3) and 7(c). The district court ruled adversely to Holly Hill on these claims, but the Circuit Court of Appeals did not reach them. It will be time enough to reach them if they survive the disposition now made of this case.

Accordingly, the case is remanded to the district court to proceed in conformity with this opinion.

So ordered.

SUPREME COURT OF THE UNITED STATES.

No. 217.—October Term, 1943.

Wilma E. Addison, Ernestine C. Lyles, Edgar Campbell, Sallie Baker and Luther Black, Petitioners, *vs.* Holly Hill Fruit Products, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 5, 1944.]

Mr. Justice Roberts.

I agree with the opinion of this court and with the opinion of the Circuit Court of Appeals that the Administrator was without power (if "area of production" is to have any sensible meaning) to exclude from the area and from the operation of the exemption workers in a processing plant clearly within the area on the ground that a certain number of employes worked in the plant. If Congress, when it said that the area of production should be defined by the Administrator, meant that that official should have a roving commission to create exemptions from the Act, the entire provision must fall as an unconstitutional attempt to delegate legislative power. We should never, however, construe an Act in a sense which would render it unconstitutional if a different and permissible construction will save it.

The legislative history makes it clear enough that Congress wished to exempt plants processing agricultural commodities in the locality of the farms which produced the commodities. Realizing that the ascertainment of the facts in particular cases would be essential to definition or delimitation of the area served, Congress, by the phrase "as defined by the Administrator", meant to permit him to draw lines in delimitation of areas appropriately to correspond to the facts. I construe the word "define", in this context, to mean "ascertain the facts and announce the result of such ascertainment." The opinions of the court below elaborate this view.

I think the Administrator's order may well be allowed to stand with the illegal and unauthorized feature of it deleted. This is

what the Circuit Court of Appeals decided and I believe it was right. Other features of the order were not, and are not, attacked and if, for the future, the Administrator desires, in other aspects, to amend his order, there is nothing to prevent. This would lead to affirmance of the judgment of the Circuit Court of Appeals and, if I could make my vote effective to that end, I should vote for affirmance. The other members of the court, however, are for reversal, but are divided on the question whether the judgment of the District Court should be affirmed or the case held in that court pending amendment of the order by the Administrator. Entertaining the views which I do, I cannot vote to affirm the judgment of the District Court, but that will be the effect of my action if I vote simply to reverse the judgment of the Circuit Court of Appeals. While I think none of the authorities cited in the opinion of Mr. Justice FRANKFURTER justify the procedure there outlined, I am constrained to vote in accordance with his opinion.

I am clear that, if the Administrator is to be permitted to amend his order, or to enter a new order effective from the date of the one under attack, he may not resort to gerrymandering or to any other device to accomplish by indirection what the decision holds he cannot do directly. I personally believe the scope of his discretion is more limited than some of my colleagues think and I do not wish my concurrence in the remand of the case to the District Court, to be there held pending the promulgation of an amended order, or a new order, to be taken as approving in advance the views expressed as to the extent of the Administrator's discretion.

SUPREME COURT OF THE UNITED STATES.

No. 217.—October Term, 1943.

Wilma E. Addison, Ernestine C. Lyles, Edgar Campbell, et al., Petitioners, vs. Holly Hill Fruit Products, Inc. } On Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 5, 1944.]

Mr. Justice Rutledge, with whom Mr. Justice Black and Mr. Justice Murphy concur, dissenting.

In my opinion the Administrator has defined "area of production" in a valid manner, and therefore the employee petitioners should prevail. But if, as the majority hold, his definition is not valid, then the exemption is not operative, and for that reason the petitioners likewise should prevail. I dissent, therefore, from the Court's conclusion that the definition is void. I dissent equally from the wholly novel disposition it makes of the cause on that hypothesis, in remanding it to await the Administrator's retroactive redetermination of the parties' rights.

I.

The basic issue, as the case was presented, is whether the Administrator can include in the definition not only spacial limits but also a limit upon the number of employees in exempted establishments. The Administrator included this factor in his first definition;[1] later reexamined it in extensive hearings;[2] concluded on the record thus made that no purely geographical definition could be conformed to the major legislative policies announced in the statute;[3] has retained it in each of several later definitions,

[1] Promulgated October 20, 1938, effective four days later. 3 Fed. Reg. 2536.

[2] See Hearings on Proposed Amendment of Section 536.2 (area of production) of Regulations issued under the Fair Labor Standards Act of 1938, Wage and Hour Division, Department of Labor Ref. Nos. 54; 73; 162a; 162b; 162c.

[3] Tests proposed and considered included: the mapping of producing territories; a flat mileage-population definition; a "first concentration point" criterion; a standard which would include only establishments which handled and prepared for the account of the farmer commodities to which he retained

varying in other details, framed after extensive hearings;[4] and now earnestly insists it, or an equivalent limitation on size of the plant, must be included, unless any definition he may make is to work havoc with some major policy of the Act, either by exempting large numbers of industrial employees[5] or by creating disturbances of competitive situations, both for farmers and for canners and packers,[6] which the statute expressly sought to avoid.

The Administrator's task is highly complex. It involves defining exemptions for employees throughout the nation engaged in "handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products." Section 13(a)(10). All these operations follow immediately upon harvest and removal from the field or milking. All can be done on the farm and frequently are done there, but may be done elsewhere, often in factories. All consist in the first stages of preparation for market.

But whether the specified operations will be done on the farm, as part of the farm work or away from it, and in either small neighborhood establishments or in larger industrial plants, will depend upon a variety of factors as great as that which comprehends the whole vast process of starting the nation's crops, over 300,[7] on their respective marketing courses. The initial steps in marketing such widely different products as cotton and apples; tobacco and milk; potatoes and citrus fruits; legume crops, wheat, corn and other grains, on the one hand, and tomatoes, strawberries, truck garden products, etc., on the other, are within the delegation.

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title. All these and others were rejected by successive administrators, after being urged and opposed by industry representatives, as presenting insuperable obstacles to carrying out the statute's major policies.

[4] Compare the definition promulgated October 20, 1938, 3 Fed. Reg. 2536, with the amendments of April 20, 1939, 4 Fed. Reg. 1655; June 17, 1939, 4 Fed. Reg. 2436; October 1, 1940, 5 Fed. Reg. 2647; and April 1, 1941, 6 Fed. Reg. 1476.

[5] Cf. Department of Labor Release R-226, March 18, 1939; G-60, July 24, 1940.

[6] A flat mileage definition was in force during part of the time material in this case, but was abandoned after its effects, by way of creating serious unfair discrimination between competing establishments and narrowing growers' outlets, became evident. Cf. Department of Labor Release G-60, July 24, 1940.

[7] Cf. Farm and Ranch Schedules, U. S. Census of Agriculture, 16th Census of the United States, 1940.

The mere enumeration of these instances indicates some of the variables involved. Others add to the difficulty. Highly perishable crops, as fruits and vegetables, require immediate action in these stages of handling. Cotton, grains, root crops, etc., less perishable, may wait longer on the farm, some for months, before these processes become necessary. Some crops are highly concentrated for production in a few regions, such as citrus fruits in Florida, Southern Texas, and Southern California, but are marketed on a nation-wide scale. Others have regional areas of production, like cotton in the South, celery in Michigan, tobacco in the border states and a few northern regions, yet depend on the national market. Still others have regions of greater or less concentration, but are grown all over the nation, like wheat and other grains, apples, potatoes, etc.

Obviously, "area of production," in the sense of where the commodity is produced for purposes of commercial marketing, will vary from the whole nation, in the case of the more common grains, fruit crops and root crops, down to a few highly concentrated regions or areas in the case of others more dependent upon special climatic and soil combinations. And between the extremes of nation-wide and highly localized production are all ranges of sectional and regional production areas.[8]

Respondent regards the "area of production" as the whole region where a commodity is grown, and therefore says the Administrator has no more to do than locate the existing limits of these areas. By this criterion the South, perhaps including California, would be the unalterable "area of production" for cotton, the whole nation for eggs, wheat, corn, etc. This conception would nullify the delegation, making of the Administrator merely a surveyor in the wrong place. Congress clearly was not making him only a finder of fact, namely, of the geographical limits surrounding regions where 300 different commodities are produced. Such a view would exempt all employees engaged in the operations specified in Section 13(a)(10).

[8] As the legislative history shows, cf. text *infra* at notes 13-16, there was fairly general agreement that some part of the work specified in Section 13(a)(10) should be exempt, whether or not it was done on the farm. But beyond this, a great variety of opinion existed both as to how far the exemption should go and as to the economic basis for it. Among the latter were views that the exemption should be made because the farmer bore the cost of the work, cf. 81 Cong. Rec. 7656, 7877, 7880; or because many farmers in fact performed it on their farms and as part of their operations, cf. Section 3(f),

The same objections forbid regarding the "area of production" as the region from which the particular plant purchases its raw material. The only substantial difference would be to make the Administrator's fact finding task a more impossible one. A definition would be required for every plant engaging in any of the specified operations for each of the more than 300 agricultural and horticultural commodities produced annually in the United States. Congress hardly could have intended to load upon the Administrator a task of these infinite proportions. Nor did it intend the employer to define its own exemption, or to make that exemption automatic. Congress intended the Administrator to define the area of production. It did not at the same time intend to overwhelm him with making myriads of particular and highly variable definitions for each operating unit, or to make him merely a runner of courses and distances, whether large or small. It rather intended him to make practical, workable and therefore generic and stable definitions.

It follows necessarily that the Administrator's power is discretionary and the important questions are to what extent and in what manner may his discretion work. Neither subdivision (a)(10) nor Section 13 as a whole supplies these answers. The section itself does not supply all the standards necessary for definition of the term. At most it affords direction to exempt some but not other employees engaged in the specified activities and that those exempted must be within the "area of production." This necessarily includes some region where the commodity is produced. But since that region is an unknown quantity and so also is the question what employees within it are to be exempted, solutions must be found either in other provisions of the statute or in the legislative history, unless the delegation is to fall for want of standards.

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52 Stat 1060; 81 Cong. Rec. 7657-7659; or because others who had to resort to independent contractors to have it done would be discriminated against unless the work were exempt; cf. 81 Cong. Rec. 7656, 7658-7660, 7876. Some legislators were concerned to have the exemption apply whether the work were done in large or small plants; others to limit it to small ones only; and still others to secure it completely for particular crops. Numerous amendments were tendered, but for the most part defeated. It was not until the Conference Committee's report was framed that the problem was solved by referring it to definition by the Administrator. But even proponents of the amendments which were adopted recognized that the problem was one which "the board . . . would have to decide," 81 Cong. Rec. 7878, "something that would have to be worked out," 83 Cong. Rec. 7401.

The statute itself furnishes clear guides for directing the Administrator. He is confined, as has been noted, by subsection (a)(10) to employees engaged in the specified initial operations of marketing. They must work within some producing region. Apart from the exemption they are within the Act's coverage, but close to the major line it draws between farm workers, who are excluded from, and industrial labor, which is within its coverage. Depending, not upon what they do, but upon where and how they do this work, they would fall on one side or the other of this line and within or without the incidence of the evils the Act sought to eradicate. These were "the existence, *in industries* . . . of *labor conditions* detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well being of workers. . . ."[9] Congress exercised its authority over commerce, "to correct and as rapidly as practicable to eliminate the conditions above referred to *in such industries* without substantially curtailing employment or earning power." Section 2(a), (b). (Emphasis added.)

The broad line between farming and industry runs throughout the Act.[10] It is the statute's basic line of policy between coverage and noncoverage. The line not only is pertinent to each of the statute's provisions but, where the contrary is not clearly and unambiguously stated, it is controlling. There can be no assumption that Congress intended employees in one group to be transferred to or treated as being in the other where no such clear mandate can be found.

In determining what Congress intended by the delegation, it is crucial to keep in mind that, whatever decision the Administrator

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[9] Section 2(a). These conditions Congress found burden commerce, lead to labor disputes obstructing it, interfere with fair and orderly marketing, and spread themselves by causing the channels of commerce to be used for marketing among the several states the goods produced under them. *Ibid.*

[10] "'Industry' means a trade, business, industry . . . in which individuals are gainfully employed." Section 3(h). "'Agriculture' includes farming in all its branches . . . and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." Section 3(f). Section 5 provides for industry committees and their functioning, to which the Administrator submits data and from which he receives recommendations and reports which he must approve before making them effective in the form of minimum wage rates and industry classifications. Cf. Section 8.

may make and by whatever criteria, the effect of his action must be to put some employees on one side of this line and others on the opposite side. That consequence he cannot escape. And, because he cannot avoid it, the line is pertinent and material to his choice, as it is to all others he must make in performing his duties. It is the statute's lodestar. The distinction between farming and industry is the essence of his determination. An "area of production" determined without reference to this distinction would contradict, not enforce, the statute's basic policy. And this appears, not solely from the policy itself and the effects of failure to take it into account, but from a consideration of other determinations the Act confides to the Administrator and of the manner in which it requires him to make them.

Thus, in issuing minimum wage orders and industry classifications, he and the industry committees must have "due regard to economic and competitive conditions," and act so as not to "substantially curtail employment" or "give a competitive advantage to any group." And there is a specific prohibition against fixing wages or classifications "solely on a regional basis." Rather the governing criteria are to be competitive conditions, wages for comparable work fixed by collective bargaining or by voluntary minimum wage plans. Section 8(b), (c), (d). The statute's primary design was to bring industrial workers under its protections and to eliminate as rapidly as possible the substandard conditions of such labor. But this was to be done with an eye also to two other matters: one, that by too rapid advance employment be not curtailed; and, two, that competitive conditions in the affected industries be not unduly disturbed or competitive advantages created. Cf. Section 2.

These purposes were inescapably pertinent to the problems of exemption arising under Section 13(a)(10). They were likewise pertinent to other exemptions, cf. Section 7(c) and compare Section 7(b), and to still other delegations the statute confided to the Administrator. That Congress did not burden the books with "an itemized catalogue"[11] of standards in each instance of delegation, gives no basis for believing that what permeated all else found these parts insulated. The Administrator clearly had power, and more, the duty, to take account of these factors.

[11] National Broadcasting Co. v. United States, 319 U. S. 190, 219.

If so, he could not escape the question of size. And indeed the Court does not deny this. Size certainly is not irrelevant to distinguish within any group which may do essentially the same work in two different ways, one the farming way, the other the industrial one. It is not irrelevant to economic dislocations or to curtailments of employment. And it is relevant to these things as much within as without an area of production.[12]

The legislative history discloses one object of the exemption as originally proposed was to protect small farmers, who are unable to perform these operations at the farm and therefore are dependent upon whatever nearby establishments may exist, whether large or small. Various members of the Senate and of the House sponsored amendments for this purpose.[13] As the bills went to conference each contained flat exemptions, substantially covering the activities now specified in Section 13(a)(10). But the debates in both houses show that even the sponsors of the various amendments differed or were doubtful concerning whether the amendments would give exemption to large plants.[14] There was general

[12] Respondent however, consistently with its "fact-finder" or "surveyor" theory of the Administrator's function, says the purpose was not to distinguish, within the specified activities, between farmers and industrial workers; it was rather to go a step further and exempt the latter as well, provided only they were within an area of production as respondent conceives it. That the Administrator may exempt some, or perhaps many, who are in fact industrial workers, because they are doing these activities under factory conditions and methods, may be conceded. That he must exempt all of them, or some larger number than his judgment, formed after considering the facts, the statute's policies, and the effects of what he may do, finds proper, cannot be accepted. Respondent claims an exemption fixed by the Act. The statute has given it one only when, in the Administrator's judgment, not arbitrarily formed, it meets the conditions which he finds will execute the legislative policy.

[13] The Senate's first suggestion of "area of production" came from Senator Copeland, 81 Cong. Rec. 7656, although Senator Schwellenbach became the chief proponent of the concept there. Senator Black, sponsor of the bill, was concerned with the scope of "area" and sought a more accurate term for limiting its effect so as not to exempt workers in large plants, cf. 81 Cong. Rec. 7656-7660, 7876-7878, and others expressed opinions that large operators should not be exempted. For portions of the discussion on the Senate floor see also 81 Cong. Rec. 7648-7673, 7876-7888, 7927-7929, 7947-7949.

In the House of Representatives, the sponsor of the bill was Representative Norton. Chief proponent of the amendment involving "area of production" was Representative Bierman. Cf. 83 Cong. Rec. 7325-7326, 7401-7408.

[14] Responding to inquiry whether packing houses in Iowa and Illinois would be exempted by his amendment, Representative Bierman said: "Speaking frankly, I think that is something that would have to be worked out." 83 Cong. Rec. 7401. Senator Schwellenbach clearly recognized his amendment would exempt large as well as small packing and similar plants, 81 Cong. Rec. 7877, 7878, but expressed the opinion there would not be "any large or enor-

agreement that small ones should be relieved from coverage.[15] Senator Reynolds went further and proposed several amendments to relieve all small plants from the Act's provisions, not merely those engaged in the limited operations specified in the bills or Section 13(a)(10). These were defeated.[16] And there was vigorous demand, from the sponsor of the bill in the Senate and others,[17] for restricting the scope of the amending exemptions to small plants. These differences were not settled on the floor of either house. But when the bills came to conference, they were resolved by changing the flat exemptions into discretionary ones to be defined by the Administrator.

Since the delegation feature did not appear until the conference report and there is little in that report or in the debates upon it to add light; the previous discussions are wholly inconclusive, except in one respect. This was to show that there was great variety and complexity of opinion, and that this revolved around the question of size. That question continued unresolved up to conference and was resolved there, not by decision either way, but by reference to the Administrator. It must be taken therefore that the purpose was to give him discretion to make the necessary choices between the conflicting viewpoints as the facts of particular situations would give occasion for doing. And, it would seem, the preponderance of sentiment in favor of exempting small plants, but not large ones, except in occasional

mous plants'' in the specified operations. In response to Senator Black's inquiry concerning the indefinite effect of ''area'' without further definition, he said: ''I gave considerable thought to that. I do not believe it is possible, and that is something which the board, which has been accused of receiving too much power, would have to decide. It would have to provide a definition of 'immediate area of production.' '' Cf. 81 Cong. Rec. 7876-7878.

[15] See the discussions cited in notes 8, 13 and 14.

[16] Cf. 81 Cong. Rec. 7948. Respondent argues from this that the intent of Congress was shown not to authorize the Administrator, by the later conference amendment, to distinguish among plants within the ''area of production'' on the basis of size. The argument however ignores the fact that the amendments proposed by Senator Reynolds were drawn and intended to exempt from the statute's operation *all* plants having fewer than the number of employees (the amendments varied from five to ten in this respect), not merely plants engaged in the particular marginal operations specified in the various forms the Schwellenbach Amendment took during the debate. The conclusion to be drawn from the rejection of the Reynolds Amendments is not that the Senate intended to exempt all plants, large and small, covered by the Schwellenbach Amendment or by the form taken by Section 13(a)(10) in conference, but rather that the Senate was unwilling to except even all plants having as few as five employees from the statute's coverage.

[17] Cf. notes 13 and 14, *supra*, and the cited discussions.

nstances where this would be necessary to protect the small armer, well could be taken as his guiding light. The legislative istory, therefore, in so far as it sheds light at all, clearly is not nconsistent with what the Administrator has done, but on the ontrary supports it.

The Court does not find the Administrator acted improperly y taking these considerations into account. He only must not tate them in his definition. And this matter of mere formulaion is the crux of the case. The definition must be made "in elation to the complicated economic factors that operate between *gricultural labor conditions* and *the labor market of enterprises* oncerned with agricultural commodities and more or less near heir production." (Emphasis added.) The Administrator is iven "appropriate discretion to assess all the factors relevant o the subject matter," which is essentially one of "economic letermination," too complex for litigation to solve. He "may roperly weigh and synthesize all such factors."

In making his economic synthesis, however, the Administrator nust state his results only in surveyor's terms. Congress, when it ranted the exemption, "restricted the Administrator to the drawng of geographic lines, even though he may take into account all elevant economic factors. . . ." The "zone within which economic influences may be deemed to operate and outside of which hey lose their force" cannot be defined directly and purposively o draw the line between the zone of farming and the zone of ndustry. This must be done only indirectly, in an awkward, oundabout way.

Nothing prevents the Administrator from drawing the lines as e thinks best, unless the suggestion of the specially concurring pinion is followed that they must be drawn in regular circles or quares. The courts have no business to tell him where to put hem. He can define distance by air lines or by road lines to narket. He can run the lines around big towns, but not around ig factories. Baltimore could be excluded, but not Martin's omber plant or one like it, in size and methods, for processing r canning fruits and vegetables. Towns may go out, though urrounded by truck farms, but not commercial canneries. Residences, apparently, must surround the cannery. In short, the Administrator can draw whatever map lines he thinks will achieve he appropriate economic adjustments, except one which leaves

out perhaps the biggest canning factory of all, and no court can interfere. I do not believe that Congress, when it gave the Administrator his complicated task and authorized him to consider all the relevant and complex economic factors, not only denied him the power to execute those considerations in his action, but compelled him to frustrate them in defining "area of production." The Court does not deny the Administrator may consider the size of the plant, and make this even the crucial factor in his decision. Yet it would only impede or defeat his judgment, formed on proper considerations, as well as the statute's purposes, to require him to state the exemption, not simply in the terms best chosen to express his meaning clearly and definitely, but in others couched in pure though tortured geography. According to his experience and confirmed judgment, shared by successive administrators and never reversed or modified, to require the latter method of formulation would make his task well nigh impossible or, if not that, incapable of being discharged without doing violence to the Act's major purposes and standards.[18]

So much of authority and power to defeat the statute's intended operation cannot be given to mere verbalism, more especially to one word, torn in context, function and purpose from the remainder of the Act. "Area," it is true, means area. But "area of production" means more. "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage . . . to which lip service has on occasion been given here, but which since the days of Marshall this Court has rejected, especially in practice. . . . A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated."[19] And so does a section in a statute. "Area of production" as used in Section 13(a)(10) means an exemption, limited to persons performing the specified operations within a producing region, but selected from all so situated by an exercise of the Administrator's judgment in accordance with the statute's prime objects and chief limitations, among which necessarily is the size of the plant. If that is so, I see no good reason for forbidding the Administrator to say so.

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[18] Cf. notes 1-6, *supra*, and text.

[19] United States v. Monia, 317 U. S. 424, dissenting opinion at 431 422.

It follows the Administrator has not improperly exercised his function, the definitions are valid, and respondent's employees were not exempt from the statute's provisions.

II.

But if the definitions were invalid, as the Court holds, I could not agree to the extremely novel disposition it makes of the case. We are dealing with an exemption, not with the statute's primary coverage. Concededly the respondent employer was liable to petitioners for the minimum wages, overtime pay and statutory penalties under Section 16(b), if they were not exempt under Section 13(a)(10) or some other exemption. Ordinarily exemptions are not favored. Coverage, not exemption, is preferred. If the exemption is dubious, it is not given effect. If ambiguous, it is resolved strictly in favor of the statute's application. *Spokane & Inland R. R.* v. *United States*, 241 U. S. 344; *Piedmont & Northern Ry.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311-312; *McDonald* v. *Thompson*, 305 U. S. 263. In this case, if the exemption does not apply, the petitioners are within the statute and respondent is liable on their claims.

To escape liability, respondent has the burden of showing the exemption does apply. But to do this it cannot merely show the definition of the Administrator is invalid. That would only leave itself and the petitioning employees subject to the Act's provisions, which require the payment of the claims. Respondent's dilemma therefore is both sharp and real. If the definition is valid, it does not cover these employees and respondent is liable to them. If the definition is invalid, clearly it exempts no one, petitioners are covered by the Act, and the respondent must pay. This is true whether the reason dictating invalidity is want of standards, application of the wrong ones, or merely formulating the result in the wrong way. This dilemma presents the alternative which respondent, the Court of Appeals and this Court have attempted to avoid in order, so it is said, to escape an "either-or" conclusion, which is the kind the law almost always must make. It is one from which there is no escape without exercise of inventive genius beyond the right of either court to apply and which, as applied here, makes the cure worse than the disease.

Respondent's invention, and likewise the Court of Appeal's, was to strike the limitation on the number of employees and apply

the remainder of the definition. This but emasculates it. Hence all here, but one, are agreed such liberty cannot be taken with the Administrator's function. This Court's invention however does it equal or greater violence, first, as I think in emasculating it; second, and lacking even more in justification, in requiring it to be exercised with backward reaching effect.

If the Court had sought its escape in finding that there were no standards to control the Administrator's discretion or that he had applied the wrong standards, one might understand its refusal to sustain the definition. But that too would mean that petitioners would recover. The Court does neither. There is no claim, except a semblance of suggestion in a separate opinion, that the statute supplies no standards and therefore gives the Administrator "a roving commission to create exemptions." Nor is there one that the wrong standards were used. The invention is called forth only to correct a mode of statement.

If that were all, there would not be much room to complain. But, in addition to compelling the Administrator to make the definition in a manner which frustrates his function and the statute's objectives, or only partly fulfills them, the decision opens the door to a general expansion of the novel, and I think unauthorized, practice of retroactive administrative determination of private rights. That is true, unless these petitioners are to be specially treated, although less than a majority of the Court agree that the authorities cited to sustain it justify the procedure outlined. But if the procedure is justified in this case, it is in any other where an administrator mistakenly includes in a regulation a factor later held to make it invalid. No reason stated makes this case a special one. And there is none. It cannot be taken that these parties are to be singled out for unique treatment, merely in order to avoid the normal legal consequences of invalidating administrative action. Hence, every interest affected by such action now must take two risks in place of one: first, the normal, inescapable risk that the governing regulation may be held invalid; second, in that event, the novel one that some future regulation, a wholly unknown quantity, will relate back over an indefinite time to create entirely new or different and unexpected rights and liabilities.

Of course there must be room for creative analogies in the law to give the desired escape from mechanical concepts and permit

shaping its remedies. But we are as often told that Congress should perform the creative act in Congress' field. This should be most true where what we are called upon to recreate is Congress' own handiwork. If Congress intended the Administrator to act retroactively, Congress wholly failed to express this purpose.

Moreover, it is not remedies but rights which are thus refashioned. And not equity but law remolds them. Who knows, before the redefinition, what persons may be included in its coverage? Or whether it may not have to be made again? The same persons cannot be included. Otherwise there would be no point to this decision. If the Administrator can rephrase the same coverage in wholly geographic terms, apart from delay the only result will be to have criticized his language. If he cannot do this some persons, and no one can tell in advance how many, will be deprived altogether of rights, others given them who had none. So with liabilities.

The innovation would be serious if confined to this case or this Act. It is beyond prediction what the consequences may be, of uncertainty, or hardship, of injustice in deprivation of rights, in windfalls of right to others, in laying on new and wholly unexpected liabilities and in relieving from anticipated ones, if retroactive administrative refashioning becomes the general practice. The alternative, either to sustain or to hold void the regulation, and fix the rights accordingly, is not only the accepted and established one. It is the only one by which men can know the risks they assume at the time they become subject to them.

Retroactivity is not favored in law. For this there are sound reasons, in some cases constitutional ones. Cf. *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U. S. 338; *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139. There are few occasions when retroactivity does not work more unfairly than fairly. Congress, the state legislatures and the courts apply the principle sparingly, even where they may. Cf. *Graham & Foster* v. *Goodcell*, 282 U. S. 409; *United States* v. *Heinszen*, 206 U. S. 370. Seldom if ever therefore may administrative or executive authority to apply it be inferred from legislation not expressly giving it. Compare *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. R.*, 284 U. S. 370; *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110. But, in any event, whatever corrective needs may prompt and vindicate a grant of such authority in other circumstances are not present in this application. Yet, if this de-

cision is to mark the beginning of a general pattern, such authority now bids fair to become a common characteristic of administrative action.

The administrative process has increasingly important functions in our legal system. Ordinarily it does enough, if it takes care of today and tomorrow. When it begins to add yesterday, without clear congressional mandate, the burden may become too great. In any event, that has not heretofore generally been considered its task. If that task is to be added, the addition should be made by the body whence administrative power is derived, not by this Court's imaginative resourcefulness.

Finally, respondent has not asked for this retroactive "relief." And this may be for entirely good reasons of its own. What respondent sought in the District Court, what it secured in the Court of Appeals, and what it has sought here, but clearly is not entitled to have, is a judicial declaration that, as a matter of law, its employees would have been exempt under any valid definition the Administrator might have adopted. In effect, this is a claim of exemption by the statute itself, one which would nullify the Administrator's power. Relief not sought should not be forced on respondent by an exercise of this Court's inventive genius. More especially should this not be done on the court's own motion, without any of the parties having had an opportunity to consider or discuss it in the briefs or in argument. Under such a policy, generally followed, a litigant never can know with what kind of gift horse he may come out, even if successful. And in this case the parties have faced the double uncertainty, wholly unanticipated, of creation here and recreation by the Administrator, when the latter undertakes relieving the District Court of the duty to await his further action.[20]

The judgment of the Court of Appeals should be reversed and the cause should be remanded to that court for determination of the other issues in the case.[21]

Mr. Justice DOUGLAS joins in that part of this dissent which would hold that the Administrator has defined "area of production" in a valid manner.

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[20] The Administrator is not a party to this suit, but has appeared and participated here as *amicus curiae*.

[21] In view of its disposition of the case, the Court of Appeals did not consider respondent's defenses under Sections 7(b) and 7(c) of the Act, on both of which the District Court held for petitioners.